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ABSTRACT

This book is a collection of 19 addresses made at the 1978 annual convention of the National Organization on Legal Problems of Education (NOLPE). Some of the topics covered include: suits against school officials, Title IX, competency testing, teaching moral and spiritual values in public schools, the Bakke decision, unintended impacts of Supreme Court discipline decisions, reverse discrimination in black colleges, reduction in force, Public Law 94-142 and the nonhandicapped student, church-state relations in employment, religion in the public schools, private colleges, school board attorneys, educational malpractice, collective bargaining, and teacher evaluation. (Author/LD)

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Contemporary Legal Issues in Education

Edited by
M. A. McGhehey

EA 011 580 - EA 011 598

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The National Organization on Legal Problems of Education is not an advocacy organization and does not take policy positions on matters of law or public policy. However, in order to encourage discussion of controversial issues, NOLPE invites speakers from widely divergent points of view to address its annual convention.

The opinions expressed in the papers published in *Contemporary Legal Issues in Education* are solely those of the authors, and do not represent any policy determination of the National Organization on Legal Problems of Education.

M. A. McGhehey
Executive Secretary

Foreword

The research papers presented at the 1978 Annual Convention of the National Organization on Legal Problems of Education represent a prodigious amount of thought and effort on the part of writers who have a special concern as to the development of the law of public education. To the lawyer, they offer a rich source of citations to the specific topics included in the paper, together with the author's analysis of the legal issues involved. To the teacher of law, or the teacher of educational administration, they present a ready source of summarized information. To the practicing administrator, the papers provide an opportunity to keep abreast of rapidly changing developments in public school law.

I believe that the 1978 papers are of exceptional quality, and recommend them to anyone who has a particular interest in school law.

Philip K. Piele
President

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Suits for Damages and Attorneys' Fees Against School Districts and School Officials

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The 1961 decision of *Monroe v. Pape*,[1] holding that municipalities were not persons under 42 U.S.C. § 1983 and therefore immune from suit, left a state of confusion and many unanswered questions. After *Monroe*, plaintiffs began suing individuals in an attempt to obtain injunctive relief and damages directly from the individuals and indirectly from the school district. Increased activity in suing individual officials culminated in *Wood v. Strickland*,[2] which recognized the limited official immunity of public officials. *Wood* resulted in the plaintiffs having to prove that the public official either acted with malice, or with such disregard for the person's civil or constitutional rights that the action could not be said to have been taken in good faith, in order to secure damages against the individuals. At the same time there were attempts being exerted in the courts to have *Monroe v. Pape* overruled.

MONROE v. PAPE OVERRULED

The opportunity to overrule *Monroe v. Pape* came in *Monell v. Department of Social Services of City of New York*.[3] *Monell* involved a suit for back pay by women who were required to take maternity leave at a specific date but before they were temporarily physically disabled due to their pregnancy. In response to *Cleveland Board of Education v.*

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[1] 365 U.S. 167 (1961).
[2] 420 U.S. 308 (1975).
[3] 98 S. Ct. 2018 (1978).

LaFleur,[4] the New York policy was changed, but this was after suit was filed and the question of who would be liable for the back pay (damages) was presented. May damages be assessed against the New York Department of Social Services as well as against the individual officials in their official capacities? The *Monell* Court answered the question in the affirmative and overruled *Monroe v. Pape*, finding that the prior interpretation of Section 1983 was in error according to legislative history. As a result in this 7-2 decision:

> Local governmental bodies, therefore, can be sued directly under Section 1983 for monetary, declaratory, or injunctive relief where, as here, the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers . . . [and] . . . may be sued for constitutional deprivations visited pursuant to governmental 'custom' even though such a custom has not received formal approval through the body's official decision-making channels.[5]

Custom

"Custom" was not defined nor was a suggestion of what may be included within custom discussed. Citing several cases where custom was discussed, the Court described custom as "deeply imbedded traditional ways of carrying out state policies" or practices of state officials which are "permanent and well settled".[6]

Respondeat Superior

The Court specifically rejected the concept of *respondeat superior* for Section 1983 actions.

> In particular, we conclude that a municipality cannot be held liable *solely* because it employs a tortfeasor—or, in other words, a municipality cannot be held liable under Section 1983 on a *respondeat superior* theory.[7]

Section 1983 imposes liability on a local government only when it, under color of some official policy, "causes" an employee to violate another's constitutional rights. This official causation must be present to create a liability for the school or city. The local entity is not responsible for the injuries inflicted solely by its employees or agents.

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[4] 414 U.S. 632 (1974).

[5] 98 S. Ct. at 2035-36 n. 55 (1978).

[6] *Id.* at 2036.

[7] *Id.* at 2036.

Unanswered Questions

The Court left unanswered the questions of the "full contours of municipal liability under Section 1983"[8] and "whether local government bodies should be afforded some form of official immunity . . ."[9] In his concurring opinion at p. 2044, Justice Powell mentions the qualified immunity of *Wood v. Strickland*,[10] and *Procunier v. Navarette*[11] when noting that the court decision makes local governments, like public officials, liable when the "implementation of its official policies or established customs inflicts the constitutional injury."[12] Justice Powell follows up by suggesting that a qualified immunity might exist in favor of local governments for money damages.

> In any event, the possibility of a qualified immunity, as to which the Court reserves decision, may remove some of the harshness of liability for good-faith failure to predict the often uncertain course of constitutional adjudication.[13]

In *Edelman v. Jordan*[14] the Court had held that the Eleventh Amendment prohibited federal courts from entertaining suits by private parties against States and their agencies. Slightly less than one month after *Monell*, the Supreme Court reaffirmed *Edelman* in *Alabama v. Pugh*[15] by holding that a prisoner's suit against Alabama and its Board of Corrections is barred by the Eleventh Amendment, unless Alabama has consented to the filing of such a suit. The state officials were, nevertheless, retained as defendants in the suit.

THE AWARD OF DAMAGES

Since damages can now be assessed against school districts and other municipalities in the circumstances outlined in *Monell*, the question then becomes one of what injury must be proven to entitle a plaintiff to damages under Section 1983. Three months before issuing its opinion in *Monell*, the Supreme Court in *Carey v. Piphus*,[16] answered the question in a suit against school officials under Section 1983.

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[8] *Id.* at 2038.
[9] *Id.* at 2041.
[10] *Supra*, note 2.
[11] 98 S. Ct. 855 (1978).
[12] *Supra*, note 3 at 2044.
[13] *Id.* n. 9 at 2047.
[14] 414 U.S. 651 (1974).
[15] 98 S. Ct. 3057 (1978).
[16] 98 S. Ct. 1042 (1978).

Carey v. Piphus

In *Carey v. Piphus*, two students were suspended from a Chicago High School for violating school rules. The students were denied adequate procedural safeguards in their suspensions, and they sought substantial damages from the school officials whom they had sued under 42 U.S.C. § 1983. These school officials, the Court had found, had suspended them without affording them adequate procedural due process.

The Supreme Court determined that, where a violation of a constitutional right has occurred, the person injured is entitled to be compensated. The rules governing compensation for deprivation of constitutional rights must be tailored to the interests protected by the right in question. The Court concluded that the courts are well equipped and capable of making the "types of judgment concerning causation and magnitude of injury necessary to accord meaningful compensation for invasion of [constitutional] rights."[17]

Applying the Compensation Principle

Applying the compensation principle, the Court noted that procedural due process rules are not meant to protect people from the deprivation of property, but the procedures are provided to prevent "the mistaken or unjustified deprivation of life, liberty or property."[18] If a Court should find on remand that these students would have been justifiably suspended if the proper hearing had been held, the students are not entitled to recover damages to compensate them for the injuries caused by the suspension, such as the loss of educational opportunities and the mental distress of being out of school. Because these students had been denied procedural due process, absent any proof of actual injury, the students were entitled to nominal damages not to exceed $1.00.

> By making the deprivation of such rights actionable for nominal damages without proof of actual injury, the law recognizes the importance to organized society that those rights be scrupulously observed; but at the same time, it remains true to the principle that substantial damages should be awarded only to compensate actual injury or, in the case of exemplary or punitive damages, to deter or punish malicious deprivations of rights.[19]

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[17] *Id.* at 1050.

[18] *Id.*

[19] *Id.* at 1054.

If the students can prove that they were actually damaged by the act of denying them due process, they would be entitled to be compensated for the injury. Such an injury would probably be in the form of mental and emotional distress.

Emotional and Mental Distress

The Court foresaw no particular difficulty in providing evidence that emotional and mental distress was actually caused by the denial of due process itself.[20] Distress includes mental suffering and mental anguish which is a personal injury customarily proved by showing the nature and circumstances of the wrong and its effect on the plaintiff. In footnote 20, the Court makes the following observation: ". . . although essentially subjective, genuine injury in this respect may be evidenced by one's conduct and observed by others. Juries must be guided by appropriate instructions, and an award of damages must be supported by competent evidence concerning the injury."[21]

The obvious difficulty with the principles enunciated by the Court is that in applying the principle a Court must separate (i) the distress injury attributable to the denial of due process, and (ii) the distress injury attributable to the suspension from school or termination of employment for just cause. It is difficult enough to prove or defend claims of mental or emotional anguish when the act of suspension or termination and the suspension or termination are considered as one injury, but the task becomes almost impossible when the two must be separated. Secondly, the question arises as to which law should be used to determine the compensable injury: the law of the state where the constitutional wrong occurred or a national standard. If a national standard is to be used, which one will it be? The courts have, in the absence of a statute of limitations in Section 1983, applied the statute of limitations of the state in which the action is brought, and in the absence of a standard for determining mental anguish, the court may intend that the law of the state be applicable. On the other hand, anything less than a national standard might not result in the uniform application of the civil rights laws. One common law rule requires a physical injury to establish mental and emotional injury while another rule does not. These and other questions related to determining damages are yet to be answered since there was no proof of individual injury to the students for the Supreme Court to consider. ". . . With the case in this posture, there is no occasion to consider the quantum of proof required to support a particular damages award where actual injury is proved."[22]

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[20] *Id.* at 1052.

[21] *Id. See* Gertz v. Welch, 418 U.S. 323 (1974).

Carey v. Piphus Applied to Public Employees

Some circuits have awarded teachers back pay from the time of their termination, as damages when they were denied procedural due process. Back pay has been awarded as damages even when there was just cause for the termination but due process was not followed. This principle was flatly rejected by the Supreme Court in *Piphus* as it applies to damages for students who were suspended for just cause but without adequate procedural due process. In setting this standard for students, the Court makes note of the public employee cases reaching a contrary result.[23] Because the legal principles are the same for teachers as for students, the results should be the same. It is reasonable to assume that teachers who are denied adequate procedural due process in a dismissal action where just cause exists for their dismissal are not entitled to back pay or other damages resulting from the termination. The damages to which these teachers would be entitled are related to mental and emotional distress associated solely with the denial of adequate procedural due process. On the other hand, when the termination is not supported by just cause, or when the deprivation of constitutional rights is not related to denial of procedural due process, it appears that back pay is an appropriate compensation for the injury as in *Monell v. Department of Social Services of City of New York.*[24]

THE AWARD OF ATTORNEYS' FEES

Another element related to damages in Section 1983 in other cases, is a question of whether the prevailing party should be awarded attorneys' fees. In response to the Supreme Court's limitation on attorneys' fees in *Alyeska Pipeline Service Co. v. Wilderness Society,*[25] Congress adopted the Civil Rights' Attorneys' Fees and Award Act of 1976. This Act was an amendment of 42 U.S.C. § 1988 and as amended provides:

> . . . In any action or proceeding to enforce a provision of Section 1981, 1983, 1985 and 1986 of this Title, Title IX of Public Law 92-318, or in any civil action or proceeding by or on behalf of the United States of America, to enforce, or charging the violations of, . . . Title VI of the Civil Rights Act of 1964, . . . the Court, in its discretion, may allow the prevailing

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[22] *Id.* n. 25 at 1054.

[23] Carey v. Piphus, 98 S. Ct. 1051 n. 15 (1978).

[24] *Supra*, note 3.

[25] 421 U.S. 240, 95 S. Ct. 1612 (1975).

party, other than the United States, a reasonable attorney's fee as part of the costs.[26]

Awards to Plaintiffs

Congress intended that a prevailing plaintiff claiming under Section 1988 "should ordinarily recover an attorney's fee unless special circumstances render such an award unjust."[27] The Court in *Newman v. Piggie Park Enterprises, Inc.*[28] rejected the bad faith requirement for the awarding of attorneys' fees; therefore, a defendant may be required to pay the prevailing plaintiff's attorneys' fees even in the absence of a finding that the unconstitutional action was taken in bad faith. Since bad faith, or a stricter standard, such as a requirement that damages be granted, is not applicable, any finding of a constitutional violation will apparently and normally entitle the plaintiff to attorneys' fees. This is apparently true regardless of whether the plaintiff has been afforded the proven injury which is entitled to compensation for more than nominal damages of one dollar. This is also true when the relief granted is injunctive rather than monetary relief.

The Eleventh Amendment is apparently not a bar to the assessment of attorneys' fees in suits against state officials. In *Fitzpatrick v. Bitzer*,[29] the Supreme Court approved the award of attorneys' fees against a state official under Title VII of the Civil Rights Act of 1964.

Awards to Defendants

The same standard is not applicable to a defendant who prevails in a civil rights action. The defendant is not entitled to attorneys' fees simply because the plaintiff loses his case. Rather, the defendant must establish that the plaintiff's suit was "unreasonable, frivolous, meritless or vexatious or that the plaintiff continued to litigate after it clearly became so."[30] In *Christianburg Garment Company v. EEOC*,[31] a case brought under Title VII of the Civil Rights Act of 1964, the Supreme Court defined "meritless" as being "groundless or without foundation." The Court held that "vexatious" does not require a finding that the plaintiff subjectively acted in bad faith before attorneys' fees can be assessed against him but, even in doing so, the Court clearly limited the right of defendants to obtain attorneys' fees.

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[26] 42 U.S.C. § 1988 as amended.

[27] S. Rep. No. 94-1011, 94th Cong. 2d Sess. 5 *quoting* Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 402, 88 S. Ct. 964 (1968).

[28] *Id.*

[29] 96 S. Ct. 2666 (1976).

[30] Christianburg Garment Co. v. EEOC, 98 S. Ct. 694, 701 (1978).

[31] *Id.*

Factors in Awards of Attorneys' Fees

The factors used by courts for determining the amount of attorneys' fees to be awarded under these principles are varied as the courts which award them. For a thorough discussion of the standards commonly employed, see *Johnson v. Georgia Highway Express, Inc.*[32]

Evaluating the Possible Award of Attorneys' Fees

The possibility of attorneys' fees being granted is a significant consideration in determining whether cases should be pursued or settled. Attorneys' fees can be the source of significant losses to political subdivisions. This factor should be recognized by school boards and school officials determining what course of action to take in litigation. The fact that the political subdivision may also have to pay the prevailing plaintiff's attorneys' fees may have the effect of leading to timidity on the part of school officials which the Court sought to mitigate against in *Wood v. Strickland* by granting a qualified immunity for individuals. Unless *Newman v. Piggie Park Enterprises, Inc.* is rejected, and its rejection of the bad faith standard respecting the granting of attorneys' fees is reversed by Congressional action, a qualified immunity for damages as contemplated by Judge Powell in *Monell*, will grant only partial relief.

CONCLUSIONS

Suits Against Governmental Bodies and Individuals

As a result of *Monell v. department of Social Services of City of New York, supra*, there will undoubtedly be more suits filed against political subdivisions under 42 U.S.C. § 1983. As a result of the governmental body being amenable to suit, fewer suits should be filed which are aimed primarily at individual defendants. Several practical reasons support this assumption; first, the governmental body is a solvent defendant, and secondly, a lesser degree of wrongful action is necessary to secure damages from a governmental body than an individual who has a qualified immunity under *Wood v. Strickland*.

The Parameters of Suits Against Governmental Bodies

In these suits brought under Section 1983 against school districts and other political subdivisions, the parameters of the bodies' liability will obviously become a significant issue when the alleged constitutional deprivation is not immediately identifiable as a result of a policy or other written regulation of the governmental body or it appears that the complainable action could be the result of an independent act of an employee outside the specific holding in *Monell*. It is anticipated that the courts will liberally find customs in the absence of written policies or procedures. This factor, together with the court's rejection of *respondeat superior*, should encourage governmental bodies to enact legally acceptable policies which will set standards for its employees and agents.

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[32] 488 F.2d 714 (5th Cir. 1974).

Calculation of Damages

Calculation of damages under *Carey v. Piphus* will become a major issue in suits where just cause exists for the suspension of a student or termination of a teacher. If there is just cause for the suspension of the student who has not been granted procedural due process, that student will be entitled to no more than $1.00 for nominal damages if he or she is unable to prove that the denial of procedural due process resulted in injury due to distress. The same rationale also appears applicable to public employees who are dismissed without procedural due process but with just cause.

Granting of Attorneys' Fees

The granting of attorneys' fees will continue to be a major consideration under any suit with jurisdiction under Section 1983 and the other statutes noted in Section 1988. The establishment of bad faith on the part of the defendant is not determinative in granting attorneys' fees to the prevailing plaintiff, the prevailing plaintiff needs only to prove a violation. Therefore, the students in *Carey v. Piphus* who were only able to establish that they were denied procedural due process and entitled only to nominal damages not exceeding $1.00 will probably be awarded substantially more in attorneys' fees. On the other hand, a prevailing defendant is entitled to attorneys' fees only when he can establish that the suit brought by the plaintiffs was unreasonable, frivolous, meritless or vexatious.

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Title IX: The First Six Years

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TITLE IX

Title IX of the Education Amendments of 1972, codified as 20 U.S.C. § 1681 et seq., forbids sex discrimination in federally funded education programs, with certain exceptions. Some institutions are exempt altogether: United States military and merchant marine academies and schools controlled by a religious organization whose beliefs are inconsistent with Title IX. Others may practice sex discrimination in admissions, though the rest of their activities are covered by the statute. The second group includes elementary and secondary schools, private undergraduate colleges, and public undergraduate colleges that have always been single-sex institutions. Schools in the process of converting to coeducation are given a seven-year grace period for eliminating discrimination in admissions. Besides exempting certain institutions or their admissions policies, Title IX does not cover the membership practices of fraternitites, sororities, or youth service organizations like Boy and Girl Scouts, Camp Fire Girls, YMCA and YWCA, Boys' and Girls' State and Nation conferences, father-son or mother-daughter school activities or college scholarships awarded in beauty contests.

Exceptions aside, the operative portion of Title IX is a single sentence: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance . . . ." According to the primary enforcement agency, the Department of Health, Education and Welfare, the sentence regulates treatment of employees as well as students. Title IX itself provides only one penalty for violation—cutoff of federal funds to the noncomplying program. The enforcing agency must seek voluntary compliance before ordering a cutoff and its actions are subject to judicial review (20 U.S.C. § 1683). Before funds are actually terminated, the head of the agency must file a written report with the House and Senate committees that oversee the program in question and then allow thirty days to elapse.

History of the Act and Its Regulations

National interest in sex discrimination in education began several years before Title IX was enacted. A presidential task force reporting in 1970 documented the existence of discrimination in education as in other areas and recommended legislation, some elements of which became part of Title IX ("A Matter of Simple Justice," The Report of the President's Task Force on Women's Rights and Responsibilities [April 1970]). At the same time a women's rights litigation group (Women's Equity Action League) filed a class action against hundreds of higher education institutions charging them with violations of Executive Order 11246, which forbids sex discrimination on the part of federal contractors. Representative Edith Green held the first congressional hearings on sex discrimination in education in 1970, and the following year was one of five persons to introduce legislation that would prohibit sex discrimination in federal education programs. One of those proposals, sponsored by Senator Birch Bayh, passed the Senate and survived the House-Senate Conference Committee to become Title IX of the Education Amendments of 1972. The Amendments were signed by President Nixon on June 23 and became effective July 1, 1972.

Two years elapsed between the effective date of the statute and the issuance of proposed regulations by any federal agency. The enforcement section of Title IX (20 U.S.C. § 1682) directs each federal agency that funds education programs to enforce the title by issuing regulations. Although twenty federal agencies administer education programs and eight of the twenty have programs not covered by other sex discrimination legislation (Agriculture, Defense, General Services Administration, Interior, State, National Foundation on Arts and Humanities, National Science Foundation, and the Veterans' Administration), only the Department of Health, Education and Welfare (HEW) moved to prepare regulations.[1] The first effort by HEW's

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[1] See *Title IX, the Unenforced Law: Title IX Activity by Federal Agencies Other than HEW* (May, 1978), a report of the National Advisory Council on Women's Educational Programs which charges many of the agencies with ignorance of their responsibilities. On May 10, 1978, the Department of Agriculture issued proposed Title IX regulations, 43 Fed. Reg. 91 at 20012.

Office for Civil Rights (OCR) produced regulations modeled on those for Title VI of the Civil Rights Act of 1964.[2] (Title VI, on which Title IX was modeled, prohibits racial discrimination against students in federally funded education programs.) The draft was discarded, however, in response to the preferences of the President's staff and persons in HEW's regional offices who wanted more specific regulations.[3] Two lawyers, both with other on-going responsibilities, were assigned to develop a second draft of proposed regulations. The draft, submitted to the Secretary of HEW in August, 1973, was delayed for an additional ten months until June 18, 1973, because of conflict within the Department over the coverage and strength of the regulations.

The proposed regulations,[4] which covered three areas, admissions, treatment of students and employees, evoked strong public reactions. The nearly 10,000 comments received by the Department during the four-month review period are by far the greatest number ever received on one of its proposals. (Compare that number, for instance, with the approximately 3,000 comments elicited by the regulations under the controversial Family Educational Rights and Privacy Act.) Apparently, Secretary Weinberger took a serious interest in the regulations, usually resolving controversial issues in favor of a conservative stance.[5] The portions of the regulations evoking the heaviest criticism from women's groups were the exclusion of textbooks from coverage, the special restrictions placed on employees taking pregnancy leave concerning notice and time of return, the exemption of single-sex scholarships, particularly the Rhodes scholarship, failure to cover admissions to professional programs in private undergraduate schools, allowance of retirement plans with lower payouts for female employees, tolerance of separate athletic teams, and no requirement of equal expenditures in athletics. Womens' rights groups failed almost entirely to alter the regulations on those points (only the pregnancy leave requirements were dropped). Moreover, the final regulations, when they appeared in June, 1975, no longer contained requirements that students be surveyed to determine athletic interest and that affirmative steps be taken to interest women students; they permitted sex-segregation in most sports and in some circumstances total exclusion of women from particular sports.

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[2] 42 U.S.C. § 2000d (1976).

[3] Information in this and the following sentences is from the account of Fishel & Pottker, Sex Discrimination and the Administrative Rule-Making Process: The Development of the Title IX Regulation; National Politics and Sex Discrimination in Education (D. C. Heath & Co., Lexington, Mass. 1977).

[4] 45 C.F.R. Part 86 (June 18, 1974).

[5] Fishel & Pottker, at 109-113. Most significantly, the authors ascribe to Weinberger the decisions to exclude curriculum materials from coverage and to permit separate athletic teams.

Two barriers remained before the regulations were in force, both imposed by Congress at the time of Title IX's enactment. First, the regulations were forwarded to President Ford, who signed them on May 27, 1975. As he was required to do, the president then forwarded the regulations to Congress, giving it an opportunity to reject them as inconsistent with the intent of the legislation itself. (Title VI regulations had required presidential approval but not congressional review.) Despite substantial interest, led by Representative James O'Hara, in rejecting the regulations for fear of their effect on intercollegiate athletics, Congress failed to act within the 45-day period allotted, and the final regulations became effective for the most part on July 21, 1975.

Content of HEW Regulations

The regulations govern the recipient's treatment of its potential students (applicants), its students and its employees. Applicants may not be divided by sex and ranked separately nor may a limit be placed on the number of either sex admitted. Admissions tests or criteria that eliminate one sex more frequently than the other must bear a double burden of justification—first, that they validly predict success in the program and, second, that other criteria without the disproportionate effect are unavailable. Applicants cannot be asked to state their marital status. No one may be rejected because of pregnancy and any institutional rules about marital or parental status must apply equally to both sexes. Schools may not recruit primarily at one-sex institutions nor give admissions preference to graduates of these institutions if such policies produce an imbalance in admissions.[6]

The regulations on treatment of students (defined as those who have gained admission) govern financial and other forms of assistance, benefits, housing, access to courses, counseling, discipline and athletics.

Financial Assistance[7]

Sex-limited scholarships and awards are allowed, so long as the overall effect of an institution's financial aid programs is non-discriminatory. If the school gives athletic grants, it must provide them in proportion to the number of each sex taking part in interscholastic or intercollegiate competition. Fees, tuition and determination of eligibility for in-state status may not be based on sex.

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[6] 40 Fed. Reg. 108 § 86.21, § 86.22, § 86.23 (1975).

[7] 40 Fed. Reg. 108 § 86.37 (1975).

Benefits[8]

Health, accident or life insurance plans and other services offered by the school may not discriminate (but plans paying less to women are not considered discriminatory). If the institution offers full coverage health care, it must offer gynecological care.

Housing[9]

Housing may be separate[10] but must be comparable for each sex in quantity, cost, and quality.

Access to courses[11]

In general, courses must be open to men and women, with neither group either required or prevented from enrolling. There are exceptions, however. Classes in human sexuality may be segregated. Choruses may be chosen by vocal range, whatever the result. Gym classes may be separated by sex whenever contact sports are taught or played and grouping by skill is always permissible.

Counseling[12]

What is said to students or applicants by way of counseling them may not discriminate on the basis of sex. Materials that differentiate should be used only when necessary to eliminate sex bias. When courses of study or classes are substantially one sex, school officials must satisfy themselves that the imbalance is not due to discriminatory counseling or counseling materials.

Discipline[13]

Male and female students are not to be held to different standards of behavior or appearance nor punished differently. No student may be disciplined nor put out of school or class because of her pregnancy. Disciplinary rules concerning marital or parental status must apply to both sexes.

Athletics[14]

In the area of sports as an extracurricular activity, separate teams are permitted in contact sports and, in fact, whenever team-member selection is based on skill. But in noncontact sports, girls must be allowed to try out for the boys' team if there is no girls' team. Sports programs must offer equal opportunities for women and men—the regulations state that equality will be judged according to ten criteria. Unequal aggregate expenditures are not necessarily proof of discrimination. Elementary schools were given a year to implement the athletics and physical education requirements; secondary and higher institutions, three years.

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[8] 40 Fed. Reg. 108 § 86.39 (1975).
[9] 40 Fed. Reg. 108 § 86.32 (1975).
[10] This is a proviso of Title IX itself, 20 U.S.C. § 1686 (1972).
[11] 40 Fed. Reg. 108 § 86.34 (1975).
[12] 40 Fed. Reg. 108 § 86.36 (1975).
[13] 40 Fed. Reg. 108 § 86.31(b) 4 and 5; § 86.40 (1975).
[14] 40 Fed. Reg. 108 § 86.41 (1975).

The employment section of the regulations forbids sex discrimination with respect to employment criteria, recruiting and hiring, pay, job classification and structure, benefits, and pregnancy policies.

Employment Criteria[15]

The rule here is the same as that for student admissions—if criteria that eliminate one sex disproportionately are used, they must be provably related to job performance and criteria that do not have such an effect must be unavailable.

Recruiting and Hiring[16]

Jobs may not be advertised as being for one sex or the other, unless sex is a *bona fide* occupational qualification.[17] Employers who are found to have discriminated in recruiting must actively try to overcome the effects of past discrimination. No employer may focus his recruiting on sources that are predominantly of one sex if the result is to skew the numbers of that sex hired. If any applicant is asked his gender, all must be asked, and the answer cannot be used to discriminate. No applicant may be asked to indicate marital status.

Pay[18]

Employees of different sex cannot be compensated differently if their jobs require the same skill, effort and responsibility and are performed under similar working conditions. Pay must not be affected by whether the employee is the head of household or principal wage earner.

Job Classification[19]

The employer cannot classify a job as "male" or "female" nor maintain seniority lists based on sex—again, less sex is a BFOQ.

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[15] 40 FEd. Reg. 108 § 86.52 (1975).

[16] 40 Fed. Reg. 108 § 86.59, § 86.60, § 86.53 (1975).

[17] "*Bona fide* occupational qualification" means that "consideration of sex . . . is essential to successful operation of the employment function concerned." Neither comparative employment data, stereotypes of either sex, nor the preferences of the employer, his other employees, or students are sufficient to create a BFOQ. 40 Fed. Reg. 108 § 86.61 (1975).

[18] 40 Fed. Reg. 108 § 86.54 (1975).

[19] 40 Fed. Reg. 108 § 86.55 (1975).

Benefits[20]

The employer's pension or retirement plan cannot set different retirement ages (either compulsory or mandatory) for the sexes. Plans that offer smaller payouts to women are permissible, so long as the employer makes equal contributions.[21]

Pregnancy Policy[22]

No one may be denied initital or continued employment because of pregnancy. Pregnancy is to be treated like any other temporary disability for purposes of determining leave, disability income, seniority, reinstatement and other benefits. If an employer has no leave plan or the pregnant employee does not qualify for it, the regulations nevertheless require that she receive leave without pay for a "reasonable" period followed by reinstatement to the same or a comparable position without loss of benefits.

Validity of HEW Interpretations

Since HEW published final regulations, several arguments have arisen over the validity of the agency's interpretation of Title IX. In each instance recipient institutions claim that HEW is attempting to exceed the authority granted it under the Act. The most significant dispute is the question of whether Title IX was intended to cover employment discrimination. A final judicial determination that it was not would invalidate approximately half of the regulations.

The first case to strike down Title IX employment regulations was *Romeo Community Schools v. Dept. of Health, Education and Welfare*[23] in 1977. Teachers in a Michigan school district[24] complained to HEW that the district's policies on maternity leave (dictated by its collective bargaining agreement) violated Title IX. Following an HEW investigation, the Romeo school board was told to alter its policies. The board responded by obtaining both a federal court judgment that the employment regulations are invalid and an injunction preventing HEW from eliminating the board's federal funds to enforce the regulations. The rationale of that decision—quickly adopted by three other federal courts,[25] with more decisions pending—is worth presenting here in full.

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[20] 40 Fed. Reg. 108 § 86.56 (1975).

[21] This practice, however, will very likely be held a violation of Title VII of the Civil Rights Act of 1964, in light of the United States Supreme Court's decision in Los Angeles Department of Water and Power v. Manhart, 435 U.S. 207 (1978).

[22] 40 Fed. Reg. 108 § 86.57 (1975).

[23] 438 F. Supp. 1021 (E.D. Mich. 1977); *appeal pending* (6th Cir. 1977).

[24] For earlier developments in the litigation, see Thompson v. Board of Educ. of Romeo Community Schools, 71 F.R.D. 398 (W.D. Mich. 1976). The complaint charges eight local school boards with sex discrimination.

First, the court considered defendant's (HEW's) motions to dismiss for lack of ripeness and failure to exhaust administrative remedies. Under the Administrative Procedures Act (5 U.S.C. § 704), a federal district court may review only final agency action and HEW contended no such action had occurred since plaintiff still received funds. But the court accepted plaintiff's argument that publication of the regulations was in fact the final agency action to be reviewed. It held plaintiff is not required to await termination of funds and then seek review of that decision before the Sixth Circuit Court of Appeals, as indicated in Title IX's judicial review section (§ 1683). Nor is the court persuaded that the school board should be made to pursue its remedy through HEW before turning to the courts.

On the cental issue, the validity of the employment regulations, the court ruled that HEW exceeded its authority by covering employees. Commenting on the similarity between Title IX and the act on which it was based, Title VI of the Civil Rights Act of 1964, the court acknowledged that Title VI specifically excludes employment while Title IX is silent on the subject. This does not prove, however, that Title IX *includes* employment. The omission from Title IX of language about employment can be explained by the fact that it passed as part of a bill containing amendments to Title VII of the Civil Rights Act of 1964 and to the Equal Pay Act, both of which deal with employment. Thus, to have included a statement that nothing in the bill affects employment would have been contradictory and highly confusing. The court makes a similar point in reviewing the legislative history of Title IX. Although there are statements by Senator Bayh, Title IX's sponsor, that the bill covers employment, the court concludes that his remarks referred to the entire legislative package, which contained the Title VII and Equal Pay Act amendments. The legislative history of the regulations themselves is dismissed as irrelevant for two reasons—first, the Congress reviewing the regulations was not the one that passed Title IX and, second, Congress has expressly provided that its failure to disapprove regulations shall not be read as approval of them.[26]

The court then applied 'plain meaning' statutory construction to Title IX and found that employees are not covered. It concluded, "Section 1681 must therefore be read to protect from sex discrimination only those persons for whom the federally assisted education programs are established and this can only mean the school children in those programs"[27] and "Teachers, in short, are hard pressed to fit themselves within the plain meaning of § 1681's prohibitory language, general as it may appear on its face."[28] Next, the court noted that every one of the exclusions from coverage contained in Title IX relates to students. If Congress had meant to reach employment under the Act, presumably it would have chosen to limit employment coverage also. The enforcement mechanism is another argument. Congress would not have created a system in which the only remedy for employment discrimination—fund cutoff—penalizes students rather than employers. (The court explained the fact that the remedy for discrimination against students also penalizes students by saying in that case "Congress balanced the costs and benefits involved and determined that any benefit which students might derive from the education programs financed by HEW was more than outweighed by the sex discrimination in those programs."[29]) Moreover, according to the court, Title IX is program specific, that is, it only applies to the programs within an institution receiving federal funds rather than to the whole institution. Employment practices, however, are usually institution-wide. Therefore if HEW were permitted to use Title IX regulations to control institutions' employment policies, the agency would violate the program-specific directive in Title IX itself. Finally, the court considered and rejected HEW's "infection" theory, which argues that funds may properly be denied the whole institution when discrimination outside the federally funded part infects the institution's environment so that all students feel the poisonous effect. The court refused to believe that HEW developed the employment regulations to fight "infection," since they apply to many kinds of employment practices that do not affect students.

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[25] Brunswick School Board v. Califano, 449 F. Supp. 866 (Me. 1978); McCarthy v. Burkholder, 448 F. Supp. 41 (Kan. 1978); Seattle University v. Dep't. of Health, Educ. and Welfare, 16 F.E.P. 719 (W.D. Wash. 1978).

[26] 20 U.S.C. § 1232(d) (1) (1976).

Following the *Romeo* decision, the federal court for the western district of Washington issued an identically reasoned decision in a dispute between Seattle University and HEW,[30] which is now on appeal. The university employees in that case were faculty members of the School of Nursing complaining of sex discrimination in pay. Two other decisions, like *Romeo*, involved school board policies that violate § 86.57(c) of the regulations, requiring pregnancy be treated like a temporary disability. *McCarthy v. Burkholder*,[31] was an action for damages by a Kansas teacher who was denied the use of her accrued sick leave for maternity leave. Her action was dismissed primarily on the grounds that Title IX cannot be the basis for a damage action, that the only remedy under it is federal fund termination. In addition to that holding, though, the opinion cited *Romeo* approvingly to the effect that the employment regulations are invalid. The most recent reported case on point is *Brunswick School District v. Califano*.[32] It, like the Seattle University case, followed the reasoning of *Romeo* exactly.

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[27] 438 F. Supp. 1021 at 1031.

[28] 438 F. Supp. 1021 at 1032.

[29] *Id.*

[30] Seattle University v. Dep't. of Health, Educ. and Welfare, 16 F.E.P. 719 (W.D. Wash. 1978).

Romeo has been appealed by HEW and is currently pending in the Sixth Circuit Court of Appeals. Two cases are pending before an Ohio federal district court. One is an action brought by the University of Toledo against HEW[33]; the other, by the Bowling Green City Schools.[34] in the latter, the school district has won a preliminary injunction preventing HEW from withholding funds until the validity of the employment regulations can be adjudicated in the *Toledo* case. A federal district court in Missouri has also struck down the employment regulations recently.[35] HEW recognizes the barrier to enforcement created by *Romeo* and its progeny. In August, an HEW administrative law judge ruled that the agency may not proceed with cutoff of funds to Hillsdale College (Michigan) because the institution refused to file a compliance statement. Judge Perlman ruled that termination was discretionary and, in light of the question of validity raised by *Romeo*, would be inappropriate. Secretary Califano says the agency will continue to enforce the employment regulations but will confine its activity to investigating complaints. When discrimination is found, most cases will be forwarded to the Justice Department for further action. Justice Department attorneys state that unless appeals courts decisions in the *Romeo* and *Seattle* cases are available soon, the department will look for an employment test case among the complaints referred by HEW.[36]

A second major question about the Title IX regulations arises from HEW's broad interpretation of "education program or activity." Title IX (like its model, Title VI) provides that termination of funds for noncompliance "shall be limited in its effect to the particular program, or part thereof, in which such noncompliance" occurs. Interpreted literally, this language would prevent fund cutoff to schools with, for instance, discriminatory athletic programs, since no federal money directly subsidizes athletic programs. A literal interpretation was strongly urged by the National Collegiate Athletic Association through Congressional lobbying that resulted in the unsuccessful "Tower Amendment" to exempt revenue-producing intercollegiate athletics from Title IX[37] and later through litigation.[38] Several courts have taken that view. In *Stewart v. New York University*,[39] an unsuccessful law school applicant challenged the minority admissions program on several grounds including Title IX. The court dismissed for lack of jurisdiction because the minority admissions program did not receive significant federal funds. *Romeo* and two of the cases following it[40] also assert that Title IX enforcement must be directed only against the portions of an institution's program that receive federal funds.

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[31] 448 F. Supp. 41 (Kan. 1978).

[32] 449 F. Supp. 866 (Me. 1978).

[33] University of Toledo v. Dep't. of Health, Educ. and Welfare, Docket No. 77-235, *pending* (N.D. Ohio 1978).

[34] Bowling Green City Schools v. Dep't. of Health, Educ. and Welfare, (N.D. Ohio 1978), *prelim. injunc. issued* May 8, 1978).

[35] Junior College District of St. Louis v. Califano, 18 F.E.P. 88 (Sept. 20, 1978); *appeal pending* (8th Cir.).

[36] School Law News, Vol. 6, No. 14 (July 7, 1978) 7-8.

HEW takes a different position, set out in its introductory remarks to the final regulations:

> The Department continues to take the position that athletics constitute an integral part of the educational processes of schools and colleges and, as such, are fully subject to the requirements of Title IX even in the absence of Federal funds going directly to athletics.[41]

As justification for refusing to take the program-specific language literally, the Department offers three arguments. First, some judicial interpretations of Title VI have found it applicable to athletics because they are an integral part of the educational process.[42] The Department will interpret Title IX like Title VI "in absence of specific Congressional indications to the contrary."[43] Second, courts have often recognized sports as part of the educational process in cases claiming that sex discrimination in athletics violates the Equal Protection Clause of the Fourteenth Amendment.[44] Third, Congress explicitly directed that the Title IX regulations cover athletic programs. (The instruction, however, appears in § 844 of the Education Amendments of 1974, an act of a later Congress than that which passed Title IX.) The best argument to be made for HEW's interpretation is that the Title was intended to apply to all of a recipient's intimately connected programs, whether or not they all receive federal funds directly. The fact that a recipient institution, say, a local school board, budgets for a certain number of programs and the fact that the same students benefit from them establishes sufficient connection between the programs so that discrimination in any should result in termination of funds of all. Otherwise, the effect of the statute will be negligible.[45]

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[37] Senator Tower's provision, introduced as an amendment to the Education Amendments of 1974 (Pub. L. 93-380), was deleted by the conference committee.

[38] National Collegiate Athletic Ass'n. v. Califano, 444 F. Supp. 425 (D. Kan. 1978) *dismissed for lack of standing.*

[39] 430 F. Supp. 1305 (S.D.N.Y. 1976).

[40] Brunswick School Board v. Califano, 449 F. Supp. 866 (D. Me. 1978); Seattle University v. Dep't. of Health, Educ. and Welfare, 16 F.E.P. 719 (W.D. Wash. 1978).

[41] 40 Fed. Reg. 108 at 24134 (June 1975).

[42] The Department's first citation is to Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971).

[43] 40 Fed. Reg. 108 at 24134 (June 4, 1975).

[44] Brenden v. Independent Sch. Dist. 742, 477 F.2d 1292 (8th Cir. 1973).

A third question about coverage is what makes an institution a recipient: Must the school itself receive federal funds or does the mere fact of enrolling students who do receive funds make the school a covered institution? Two HEW administrative law judges have ruled that federal student aid programs constitute federal aid requiring all parts of an institution to comply with Title IX.[46] One held that, while federally guaranteed loans are not federal assistance to the institution, the National Direct Student Loan (NDSL), Guaranteed Student Loan (GSL), Basic Grants (BEOG) and Supplemental Grants (SEOG) programs are—and their acceptance requires nondiscrimination in the whole institution.[47]

Compliance with Title IX

Not surprisingly, information on compliance with Title IX is difficult to obtain—but what there is indicates a substantial degree of noncompliance. For example, the regulations became effective July 21, 1975, and one year later HEW notified recipients that each must submit a compliance statement. Of the 20,318 recipients notified, 10,354 had submitted no statement by March, 1977, and, 3,222 had submitted unacceptable statements. Only 6,742 submitted acceptable statements. Soon afterwards, Mary Berry, HEW's Assistant Secretary for Education, commented that school officials "did not take Title IX seriously because they didn't sense a commensurate attitude on the part of HEW."[48] During the spring and summer of 1976 the American Friends Service Committee (assisted by several groups, including the League of Women Voters and the American Association of University Women) monitored twenty-one school districts in six southern states[49] for Title IX compliance. The report, entitled *Almost As Fairly*, claimed widespread noncompliance and resulted in the filing of a formal complaint with HEW by AFSC's Southeastern Public Education Program. The report was especially critical of HEW's indifferent attitude, its failure to publish guidelines for institutional grievance procedures, and its failure to begin enforcement proceedings. The study reported discrimination against pregnant students in most districts and universal differences in athletic opportunity.[50] In May, 1976, the Project on Equal Education Rights (PEER) of the NOW Legal Defense and Education Fund filed a Title IX complaint charging the education agencies of 40 states and the District of Columbia with allowing discrimination in their own operations.[51] Utah, certainly, opposed Title IX from the beginning. Its state board of education asked the state attorney general to consider filing an action challenging the regulations, and the state superintendent contacted all chief state school officers seeking support for the challenge. Support from other states was not forthcoming, however, and no action was filed.[52] In the state of Washington a 1978 survey (preliminary results) by the American Civil Liberties Union found most school districts had appointed a Title IX coordinator as required, but that nearly all these individuals had no written description of the position's requirements and held the job in addition to other full-time assignments. Preliminary results of a similar survey in Illinois showed that nearly ninety percent of Title IX coordinators were men, nearly fifty percent of them were superintendents who had assigned the position to themselves, and that the average coordinator spent less than one hour per week on the job.[53] On the other hand, in one state, Oregon, the legislature now requires that teachers and school administrators demonstrate knowledge of Title IX, Title VI, and related state civil right laws as one of the written criteria for teacher certification.[54]

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[45] *See* 53 Tex. L. Rev. 103 at 110-112 (1974).

[46] The decisions, involving Hillsdale College in Michigan and Grove City College in Pennsylvania, were noted in School Law News, Vol. 6, No. 20 (Sept. 29, 1978) 1.

[47] School Law News, Vol. 6, No. 18 (Sept. 1, 1978) 5.

[48] School Law News, Vol. 5, No. 7 (April 1, 1977) 1.

Enforcement

Judging the extent of compliance is made more difficult because HEW did not enforce Title IX until this year. Even before the regulations became effective, the agency moved in June, 1975, to lessen its obligations by issuing proposed rules for enforcement of Title IX,

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[49] Alabama, Arkansas, Mississippi, South Carolina, Georgia, and Louisiana.
[50] School Law News, Vol. 5, No. 12 (June 10, 1977) 5-7.
[51] PEER Perspective, Vol. 2, No. 2 (July 1976) 1.
[52] School Law News, Vol. 5, No. 11 (May 27, 1977) 1-2.
[53] PEER Perspective, Vol. 4, No. 3 (Sept. 1978) 2.
[54] PEER Perspective, Vol. 3, No. 2 (July 1977) 2.

Title VI, and other civil rights statutes under which it would no longer respond to individual complaints. Complaints were to become merely one source of information on noncompliance that the agency would use in choosing where and when to initiate large-scale compliance reviews. Although the proposal was eventually withdrawn after strong protest from Congress and civil rights groups,[55] HEW continued to concentrate on enforcement of race discrimination statutes.[56] Three months after the effective date of Title IX regulations, for instance, the Dallas regional office began to notify complainants that it would investigate only race discrimination claims.[57] While no other regional office flatly refused to enforce the law, policy rulings issuing from the offices frequently conflicted with one another and were occasionally—and embarrassingly—overruled by Washington.[58] The agency made no effort to acquaint recipients with their obligations under Title IX (except by requesting the annual compliance statement) and undertook no compliance reviews. Moreover, during the first year of presumed enforcement, the Office for Civil Rights of HEW had no permanent head and was targeted for major internal reorganization, which diminished its capacity for action.[59]

Women's groups litigated to compel enforcement. The Women's Equity Action League (WEAL) first filed an action against the Department to compel Title IX enforcement in 1974.[60] Two years later, with the original action still pending, WEAL succeeded in entering the *Adams v. Mathews* case, brought to require HEW to enforce Title VI. In granting WEAL's motion to intervene (reversing Judge Pratt's decision on the issue), the District of Columbia Circuit Court of Appeals found that *Adams* "put squarely at issue the question of what amount of HEW resources should be devoted to enforcement of Title IX." Since no other parties to the *Adams* suit were capable of representing that interest, the court held that WEAL was entitled to intervene.[61] Though the victory had no immediate effect, WEAL's participation in the eventual *Adams* settlement was to become the starting point for enforcement of Title IX.

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[55] In March, 1976, by David Mathews, who had replaced Casper Weinberger as Secretary of HEW.

[56] HEW's defense in *Adams v. Mathews*, 536 F.2d 417 (D.C. Cir. 1976) was that its obligations under Title VI prevented its enforcement of Title IX.

[57] These letters were sent to persons complaining of discrimination on the basis of national origin and handicap as well as sex. Fishel & Pottker, *see* note 3 *supra* at 127.

[58] The best-known reversal was the ruling against father-son, mother-daughter activities, which was repudiated by both the Secretary of HEW and the President. *Ford Acts to Permit Schools to Hold Father-Son Events*, Washington Post, July 18, 1976. Title IX was subsequently amended to exempt such events. 20 U.S.C. § 1681(a) (8) (1976).

[59] Fishel & Pottker, p. 131.

[60] Referred to in *Adams v. Mathews*, 536 F.2d 417 at 418 (1976).

[61] Adams v. Mathews, 536 F.2d 417 at 418 (D.C. Cir. 1976).

Two years after the regulations were enacted and five years after Title IX's passage, enforcement was at a standstill. HEW blamed the difficulty on its inability to develop clear policies on sex discrimination. Internal procedures had become so cumbersome that each letter of findings was approved by eight persons in addition to its author. In the numerous instances where HEW staffers disagreed on policy, letters were never issued. Those areas included pregnancy leave, the application of dress codes (especially hair length), what is meant by a recipient's "significant assistance" to some outside group that discriminates, the information needed to grant exemptions to religious institutions, and the kinds of athletic scholarship opportunities to be made available to women. Finally, internal disagreement reached a point where HEW announced that it would not publish a previously announced Title IX policy book.[62]

Then, at the close of 1977, a settlement was reached in the *Adams* case that included significant and detailed guarantees of Title IX enforcement.[63] It was agreed that OCR staff would be doubled, with 898 persons hired immediately in order to dispose of the backlog of 3,000 complaints by September 30, 1979. HEW would perform broad self-initiated civil rights reviews in addition to resolving complaints. The agency adopted the following timetable for resolution of Title IX complaints. One hundred twenty new complaints would be investigated in 1978. Until then any new complaint would be notified within 15 days whether his complaint was to be investigated immediately or backlogged. Once an individual whose complaint had been backlogged was told that HEW was ready to proceed, he must indicate continuing interest within 60 days or the agency could close the file. After 1979, HEW will backlog only a few complaints, for no longer than one year, and only after determining that it cannot handle all complaints. Any complaint for which an investigation is begun must be completed on the following schedule. Within 15 days of receiving a complaint, HEW must tell the complainant whether it gives adequate information and if not, what is lacking. Within 15 days of the completion of the complaint, HEW must notify the recipient of the charges against it. Within 105 days of receiving a new complaint or 90 days after a file is removed from the backlog, the Department must decide whether a violation took place.

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[62] School Law News, Vol. 5, No. 15 (July 22, 1977) 7-8.

[63] The Title IX litigation was settled under the name *WEAL v. Califano* as part of a three-part agreement approved by Judge Pratt (D.D.C.) on December 28, 1977, and announced the next day.

If the answer is 'no,' the complainant must be given a chance to alter the decision. If 'yes,' HEW has until 195 days after the complaint was filed to negotiate settlement. When negotiations are unsuccessful, cutoff procedures must begin within 225 days after the complaint was filed. It is further stipulated that the Department must interview each complainant at some time during its investigation of his case and that the complainant is entitled, on his request, to copies of correspondence between HEW and the recipient institution.[64]

By 1978 enforcement had begun. In the first three months of the year HEW resolved 200 Title IX complaints, producing corrective action in 79. An official predicted that 1,000 complaints would be disposed of before the year closed.[65] For the first time, some complainants received financial settlements[66] and the Department began procedures for terminating funds.[67] Secretary Califano acknowledged the Department's past failures, and announced the formation of a new unit within OCR to answer policy questions on the athletic regulations, which he saw as primarily accountable for enforcement delays.[68]

Litigation Under Title IX

Title IX did not produce a substantial body of litigation in its first six years. One explanation is the superiority of Title VII of the Civil Rights Act of 1964 as a remedy for sex discrimination in employment. An employee of an educational institution who seeks legal redress for sex discrimination is likely to prefer Title VII for two reasons: first, uncertainty over whether Title IX was meant to cover employment and, second, uncertainty over whether Title IX confers a private right of action, that is, whether individuals may sue on the basis of Title IX. The employment coverage question has already been discussed at some length in connection with the *Romeo* decision. It will only be noted here that the existence of four federal court decisions invalidating the employment regulations must discourage reliance on Title IX by employees who have other remedies. The second problem, the existence of a private right of action under Title IX, is a complicated matter which the United States Supreme Court has agreed to rule on this term.[69] Pending that decision, since it is certain that Title VII does permit individual suits, employees may prefer Title VII for that reason also. The few employee-plaintiffs who have relied on Title IX fall into distinct categories. One group (the teachers in *Romeo*, for example) claimed sex discrimination rising from an employer's policies on pregnancy. Since the United States Supreme Court held that failure to treat pregnancy like other temporary disabilities did not violate Title VII,[70] such employees felt they needed to use Title IX—though it has never been likely that policies which violated neither the Constitution[71] nor Title VII would be held to violate Title IX, whatever its regulations provide. In any event, Congress has now amended Title VII to eliminate differential treatment of pregnant workers in many categories[72] and such plaintiffs have no further need of Title IX. Another group of employee-plaintiffs resorted to Title IX either because their Title VII claim was time-barred[73] or because they wished to litigate without waiting for the permission from the Equal Employment Opportunity Commission required for Title VII suits.[74] Finally, some employees simply relied on Title IX in addition to, not instead of, Title VII.[75]

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[64] PEER Perspective, Vol. 4, No. 1 (Feb. 1978) 1-2.

[65] Statement by Cynthia Brown, director of OCR's Office of Compliance and Enforcement. Ms. Brown blamed past inaction both on invalid complaints and the poor quality of OCR investigations. School Law News, Vol. 6, No. 11 (May 26, 1978) 6.

[66] Two hundred West Virginia teachers received over $125,000 in settlements involving maternity leave policies. School Law News, Vol. 6, No. 12 (June 9, 1978) 7. A teacher at Southwest State University in Minnesota received $9,600 in back pay and $621 in health insurance premiums in settlement of her claim of discrimination in promotion. School Law News, Vol. 6, No. 9 (April 28, 1978) 2.

[67] New funds to Dougherty County, Georgia schools were ordered withheld and funds to Grove City College (Pennsylvania) were ordered to be terminated. School Law News, Vol. 6, No. 20 (Sept. 29, 1978) 1-2.

[68] School Law News, Vol. 6, No. 16 (Aug. 4, 1978) 7; Vol. 6, No. 18 (Sept. 1, 1978) 10.

An equally small number of students have gone to court relying on Title IX. Explaining the scarcity of litigation by students and applicants for admission must be more speculative, since it is arguably the best remedy available to them.[76] The major legal barrier is the private right of action question, discussed above under employee litigation. Geraldine Cannon, through whose case the Supreme Court will decide the issue, is an unsuccessful applicant for admission to a private university's medical school. As such, she has no claim except under Title IX for remedy of sex discrimination. A number of courts, besides the Seventh Circuit Court of Appeals which held against Ms. Cannon, have ruled against allowing a private right of action[77] and others have raised the question without deciding it.[78] Thus a substantial amount of litigation is eliminated at the outset. Then, too, most students are minors or young adults. Persons of that age are less likely than older persons to understand their rights and much less likely to be financially able to litigate. Monetary damage caused by sex discrimination against students is hard to assess and prove, so there is slight financial incentive to litigate. Suits for equitable relief are far more likely—and do occur—but they present their own difficulties. Student generations are short. The girl who wants a place on her high school baseball team will have graduated or at any rate the season will be over before trial.[79]

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[69] Cannon v. University of Chicago, 559 F.2d 1063 (7th Cir. 1976) *cert granted*, 57 L.Ed.2d 1159 (July 3, 1978).

[70] General Electric v. Gilbert, 429 U.S. 125 (1976).

[71] Geduldig v. Aiello, 417 U.S. 484 (1974).

[72] P.L. 95-555 (Oct. 31, 1978).

[73] Leake v. University of Cincinnati, 12 F.E.P. 1 (S.D. Ohio 1976).

[74] Sobel v. Yeshiva University, 12 E.P.D. 11, 157 (S.D.N.Y. July 1, 1976).

[75] Piascik v. Cleveland Museum of Art, 426 F. Supp. 779 (N.D. Ohio 1976); Sweeney v. Board of Trustees of Keene State College, 569 F.2d 169 (1st Cir. 1978).

[76] Title VII, the Equal Pay Act and the executive orders prohibiting sex discrimination do not protect students. Their other remedies would be claims based on the Constitution or 42 U.S.C. § 1983.

Some few students have taken their grievances to court, however. Almost the first to do so was a boy, who protested his school's rules on male hair length.[80] The court was unsympathetic, concluding that the letter of the regulations had been violated, but not their spirit. Finding that the purpose of Title IX is to ensure as much federal assistance for girls as for boys rather than to erase physical differences, the judge stated, ". . . it is obvious that boys' hair is treated differently than girls'; the difference is based on sex; but is this discrimination within the purview of 20 U.S.C. § 1681? The court thinks not."[81]

Another unusual case is *Alexander v. Yale University* in which several students charged sexual harassment by professors. In a long and carefully reasoned opinion[82] the judge denied the university's motion to dismiss in regard to one of the plaintiffs, a senior who alleged that she received a low grade in a course in her major after refusing the teacher's offer to give her an "A" in return for sex. She further alleged that she complained immediately to Yale officials, who told her nothing could be done, and that the grade was harming her chances of law school admission. The court agreed that the allegations, if proven, would constitute sex discrimination under Title IX and noted that similar situations in employment have been compensable under Title VII. To establish jurisdiction, the opinion attempted to refute the

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[77] Cape v. Tennessee Secondary School Athletic Ass'n, 424 F. Supp. 732 (E.D. Tenn. 1976), *reversed on other grounds*, 563 F.2d 793 (6th Cir. 1977); Leake v. University of Chicago, 12 F.E.P. 1 (S.D. Ohio 1976); McCarthy v. Burkholder, 448 F. Supp. 41 (D. Kan. 1978); Leffel v. Wisconsin Interscholastic Athletic Ass'n, 444 F. Supp. 1117 (E.D. Wis. 1978).

[78] Sobel v. Yeshiva University, 12 E.P.D. 11,157 (S.D.N.Y. July 1, 1976); Sweeney v. Board of Trustees of Keene State College, 569 F.2d 169 (1st Cir. 1978).

[79] Carnes v. Tennessee Secondary School Athletic Ass'n, 415 F. Supp. 569 (E.D. Tenn. 1976).

[80] Trent v. Perritt, 391 F. Supp. 171 (S.D. Miss. 1975).

[81] *Id.* at 173.

[82] Civil No. N-77-277, Slip Opinion, (D. Conn. Dec. 21, 1977). The opinion of the magistrate was adopted as the opinion of the court.

Seventh Circuit decision in *Cannon.*[83] Using the criteria established by the Supreme Court for inferring private rights of action from civil rights statutes,[84] the court recognized a right to sue under Title IX because the Yale student is within the class intended to be protected by the legislation, the cause of action is no more appropriate for state than for federal courts and the statute's legislative history does not reveal a clear intent to preclude a right of action. The opinion noted that the contrary result would leave sex discrimination complaints of students less remediable than race discrimination complaints, though Title IX and Title VI were intended to be analogous. Moreover, HEW's Title IX enforcement has been manifestly inadequate, leading to the necessity of private enforcement as a remedy. As the court put it, [T]here is good reason to believe that to leave [plaintiff] Price to her administrative remedy would be an empty exercise."

Only one area of the regulations has generated a cluster of cases: athletics. Each of the seven reported decisions arose from the desire of a high school girl to compete in interscholastic sports. Title IX was an issue in each, sometimes supporting the plaintiff's claim and at other times being attacked by her as conflicting with her Fourteenth Amendment right to equal protection. It is not always true, however, that Title IX was a ground of the decision. In the earliest case, *Brenden v. Independent School District 742,*[85] the Eighth Circuit Court of Appeals affirmed the district court's invalidation[86] of the rules of the Minnesota high school athletic association that forbid boy/girl competition. The decision was based on a denial of equal protection; the court found no rational relationship between the rules and a legitimate state goal. Since the *Brenden* plaintiffs wished to participate in non-contact sports (tennis and cross-country running and skiing) and their schools had no girls' teams, they presented the most sympathetic kind of fact situation. Title IX, which was enacted only six months before the appeals court heard the case and had no explanatory regulations at that time, was simply noted as evidence of Congressional interest in eliminating sex discrimination.

In the two latest cases the plaintiffs successfully challenged the constitutionality of the Title IX regulation allowing separate teams in contact sports or skill competition of any kind (45 C.F.R., Part 86. § 86.41(b)). In one, an Ohio school board sponsoring a basketball team with two female members sued the state education agency and the Ohio athletic association to enjoin enforcement of the rule against coed competition in contact sports.[87] After finding sufficient state action to make the state department and state board of education proper parties, the court held the rule violates the Equal Protection Clause. It held further that the Title IX regulation allowing separate teams violates due process "to the extent it authorizes recipients of federal aid to deny physically qualified girls the right to compete with boys in interscholastic contact sports."[88] In the other,[89] the plaintiffs sued on behalf of female public high school students in Wisconsin challenging the athletic association rule against coed competition. They claimed that the rule, as applied, denied equal protection in these situations 1) when the school provides no girls' team 2) where the girls' team's program is not comparable to the boys' or 3) where the level of competition on the boys' team is higher than on the girls'. The association's defense was that its regulation complies with Title IX, but the court held that Title IX and its regulations cannot be allowed to preempt the Constitution. Besides, (citing *Cannon*), Title IX offers only an administrative remedy. It ruled that 1) and 2) above, offering no girls' team or one with a weaker program, violate the Equal Protection Clause but that the third situation, greater talent among the boys, does not. Costs and attorneys' fees were awarded to plaintiffs but their request for notice to the class was denied. The last point could be expected to reduce significantly the effect of the plaintiff's victory since the court found an equal protection violation "exists only where members of the plaintiff class request and are denied the opportunity to participate in a particular varsity interscholastic sport." Without notice of the litigation requests would presumably be few. In other words, the court recognized a "neutral factor" such as difference in level of student interest as justification for differences in the athletic program offered girls. Schools may wait until girls ask, and if and when they do, they may be given separate but equal opportunities. (These plaintiffs did not ask for a ruling that separate is inherently unequal, so the court reserved judgment on the question.)

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[83] Note 68, supra.

[84] Cort v. Ash, 422 U.S. 66 (1975). For a full discussion of the issue, *see Implied Rights of Action to Enforce Civil Rights: The Case for a Sympathetic View*, 87 Yale L.J. 1378 (1978).

[85] 477 F.2d 1291 (8th Cir. 1973).

[86] 342 F. Supp. 1224 (Minn. 1972).

A Tennessee federal district court found that while Title IX cannot be the basis for a private action, separate rules for girls' basketball do violate the Equal Protection Clause.[90] The Sixth Circuit Court of Appeals reversed, finding no reason rules should not take account of physical differences between most boys and most girls.[91] As in the preceding case, the court noted, almost regretfully, that the plaintiff did not challenge the constitutionality of separate leagues, only the rule difference. In Nebraska and Tennessee again, young women gained preliminary injunctions permitting them to participate by relying on Title IX as well as the Constitution. In *Bednar v. Nebraska School Activities Ass'n*[92] the Eighth Circuit sustained the issuance of an injunction to a girl who qualified as the school's fourth best runner but was barred by the state association rule from a place on her school's five-man team. The Tennessee association rule forbid male/female competition in contact sports, and defined the plaintiff's chosen sport, baseball, as a contact sport. Her school did not sponsor girls' baseball. The court granted the injunction on the assumption that she would prevail on the merits. In the first place, it is doubtful, the court said, that baseball is a contact sport—Title IX regulations do not list it as such. In the second place, the stated purposes of the rule—to protect girls from injury and to protect girls' sports from superior male competition—were not accomplished since there was no girls' team. Hence the rule bore no rational relationship to a legitimate state goal.[93]

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[87] Yellow Springs Exempted Village Sch. Dist. v. Ohio High Sch. Athletic Ass'n, 443 F. Supp. 753 (S.D. Ohio 1978).

[88] *Id.* at 759.

[89] Leffel v. Wisconsin Interscholastic Athletic Ass'n, 444 F. Supp. 1117 (E.D. Wis. 1978).

One final case[94] illustrates the difficulty of student litigation. The plaintiff initiated a class action while a high school senior wanting to play varsity basketball. By the time her third amended complaint came before the district court it rested on the Fourteenth Amendment and Title IX, and claimed that the Title IX regulation permitting separate teams violated both. She lost in district court but appealed to the Seventh Circuit, which remanded for trial.[95] By this time, the plaintiff had graduated from high school and the defendant board of education moved to have her class certification rescinded. The court agreed that she was no longer a proper representative of Chicago high school girls and, after three years of litigation, dismissed the case.

CONCLUSION

For those who hoped Title IX would be a useful tool for women seeking equality in American society, the preceding account may be discouraging. It is the narrative of a federal law that the federal government did not enforce and that the federal courts interpreted so as to minimize its effectiveness in litigation. Thus far no one could prove that Title IX has had the slightest impact on the familiar, depressing litany of statistics: one-third of adult women lacking a marketable job skill; one-third of women employed working in five low-paying occupations; average female salary 59 per cent of average male salary; women making up only 5 per cent of workers earning $15,000 or more; 40 per cent of U.S. families below the poverty line headed by women, and so forth.[96] Indisputably, Title IX's effect, if any, has been symbolic. But I believe its enactment has and continues to have a positive effect. Women are educating themselves in greater numbers than ever before. This year for the first time in U.S. history the "average college student" is a woman, that is, women now comprise more than 50 percent of the enrollment in higher education institutions. The fact is that attitudes toward women and their aspirations for themselves are changing in the United States, and Title IX, while it has not created change, at least shows recognition and most important, approval of that change from the highest level of government.

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[90] Cape v. Tennessee Secondary School Athletic Ass'n, 424 F. Supp. 732 (E.D. Tenn. 1976).

[91] 563 F.2d 793 (6th Cir. 1977).

[92] 531 F.2d 922 (8th Cir. 1976).

[93] Carnes v. Tennessee Secondary School Athletic Ass'n, 415 F. Supp. 569 (E.D. Tenn. 1976).

[94] Lavin v. Chicago Board of Education, 73 F.R.D. 438 (N.D. Ill. 1977).

[95] 527 F.2d 58 (7th Cir. 1975).

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[96] *The Earnings Gap Between Men and Women*, publication of the Women's Bureau, Employment Standards Administration, Department of Labor, Washington, D.C. 20210.

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Proficiency Testing and the Law: an Old Problem with a New Twist

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INTRODUCTION

One of the most intense and confusing public debates in the 1970's has centered on court-ordered busing. While the courts continue to grapple with this complex issue in an effort to operationalize this nation's commitment to equal educational opportunities, ancillary issues push to the front. Competency or proficiency testing is one such issue, and excepting only desegregation, it carries the greatest emotional charge. At the center of the debate is whether competency testing can help educators to respond positively to the public's demand for accountability in teaching and learning.

The plea for minimal competencies emerged because of the numerous students who receive high school diplomas yet prove to be functionally illiterate. Responding to this problem, laymen, educators and lawmakers alike demand the assurance that the diploma will cease to be a meaningless, counterfeit document.

The goal of setting minimal expectations for students may be laudatory, be it competency testing or not. But the issue of minimum competency testing is not without its economic, political, legal, administrative, conceptual and technical problems.

Thus, educators find themselves in a quandary. On the one hand, students can no longer leave high school functionally illiterate. The education profession, parents, society and the students themselves can no longer tolerate bogus diplomas. On the other hand, educators must question the wisdom of implementing competency testing programs when many of the key questions surrounding the process remain unanswered. Moreover, our failure to address these questions can lead only to litigation and more court involvement in our professional province.

Depending upon one's perspective, this current insistence upon competency testing could be viewed as simply another fad. Nevertheless, departments of education, school districts, and legislatures have already enacted minimum-competency testing legislation, provisions or policies in Florida, Oregon and Colorado, and almost every other state has studied or is studying the complex issues surrounding competency testing.

I do not intend, here, to question the need of assessing student performance. Rather, the purpose of this paper is to discuss the legal implications inherent in the competency testing issue. In addition, I plan to examine the basis of the current interest in competency testing. Finally, I will discuss the legislative and judicial considerations surrounding the issue. Before discussing competency testing, however, I should review its historical development, in order to put the issue of competency testing into proper perspective.

COMPETENCY TESTING: ITS SIGNIFICANCE AND BEGINNING

The Societal Setting

The quest for educational accountability is not recent, but is woven into the historic fabric of education. For example, in 339 B.C. when the "hemlock touched Socrates' lips history recorded for the first time the act of holding a teacher accountable for what he was teaching."[1] Plutarch, over two millenia ago, counseled:

> Fathers, themselves, ought every few days to test their children, not rest their hopes on the disposition of a hired teacher; for even those persons will devote more attention to the children if they know they must from time to time render an account.[2]

Accountability extended not only to what was taught, but also to the process of teaching itself. During medieval times students frequently paid their professors and tutors directly. According to Friedrich Heer, "The students, who had the whip hand, kept their professors to a punctual observance of the lecture timetable, under threat of financial penalties, and revenged themselves on unpopular teachers by boycotts."[3]

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[1] Ornstein & Talmage, *The Rhetoric and the Realities of Accountability*, 62 Today's Education, Sept. 1973, 70.

[2] R. Ulich, Three Thousand Years of Educational Wisdom (Cambridge, Mass.: Harvard University Press, 1948) 96.

Much more recently, within the past twenty-five years, accountability has been sought by way of stated educational goals, teacher evaluations, student assessments, instructional and program evaluations, student assessments, instructional and program evaluations, budgetary allocations, and the job descriptions of school administrators. Disenchanted with the meager success of compensatory education programs, President Nixon announced in 1974 that "school administrators and school teachers are responsible for their performance and it is in their interests, as well as in the interests of their pupils, that they be held accountable."[4]

In the past, accountability centered on what should or should not be taught, with the responsibility for learning residing with the student. This point of view has changed; now it is the educational institution that must guarantee the learner's success. This re-emphasis has involved attempts to improve education through the application of business techniques. Additional attempts to make educators and the education profession more accountable have included vouchers, performance contracting, and state-wide student assessment.

A Recent Invention

Unlike general accountability, competency testing is a recent "invention" designed to respond to the public demand for accountability by supposedly placing the responsibility on the educational delivery system, rather than on the learner, to assure that students no longer leave high school functionally illiterate. Instead of placing the responsibility on the educational organization, competency testing appears destined to become simply a more sophisticated approach for holding students and teachers accountable. William Ryan refers to this phenomenon as blaming the victim. "Victim blaming is cloaked in kindness and concern, and bears all the trappings and statistical furbelows of scientism; it is obscured by a perfumed haze of humanitarianism."[5] The point here is that, at least in some instances students are held responsible for their own miseducation.

Although numerous states have instituted testing programs designed to assure that high school graduates possess minimum competence in the basic skills, it was the Oregon State Board of Education that first provided the impetus for the competency testing movement across the nation. The Oregon Board passed its requirements in September, 1972, an action that provided the jolt "that set in motion across the nation a series of actions by state level policy makers and administrators to consider, formulate and implement regulations and procedures"[6] associated with competency testing. "As of March 15, 1978, 33 states had taken some type of action to mandate the setting of minimum competency standards for elementary and secondary students."[7]

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[3] F. Heer, The Medieval World (N.Y., New American Library, 1961).

[4] Hottleman, *Accountability Movement*, 39 Education Digest, April 1974, 17.

[5] W. Ryan, Blaming the Victim (Vintage, New York, 1971) 6.

In addition to Oregon, the states of Connecticut, Arizona, Florida, Idaho, Louisiana, Maryland, Nebraska, and Tennessee[8] are concerned with the mastery of the basic skill areas. Other states allow school districts to determine the areas in which minimum competencies must be achieved.

Legislators, Legislation and Confusion: A Dilemma

The onslaught of recent competency testing legislation should have come as no surprise to educators, especially when one takes the current fervor over Proposition 13 in California into consideration. Like Proposition 13, competency testing legislation evolved from citizen pressure rather than from the careful deliberation of professionals. This lack of professional leadership appears to be the main reason educators can get neither citizens nor legislators to stop or even slow the fastest growing trend in American elementary and secondary education so that some of the issues critical to the success of minimum competency testing can be addressed dispassionately. Nevertheless, the responsibility for any competency testing failure is liable to be laid to the educators.

The passage of the state statutes, the promulgation of rules and regulations, the establishment of procedures, and the implementation of competency testing legislation have occurred with such rapidity that those leading the charge for what appears to be a legitimate cause discourage persons of reason and good will from taking a contrary position. The fact that minimum competency testing is being touted as the last chance for educators to correct past mistakes cloaks its supporters with a great degree of immunity. I believe that this mantle may, in fact, shield the issue from scrutiny until it is too late.

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[6] Spady, *Competency Based Education: A Bandwagon in Search of a Definition*, 6 Education Researcher (Jan., 1977) 9.

[7] Pipho, *Minimum Competency Testing in 1978: A Look at State Standards*, 59 Phi Delta Kappan (May, 1978) 585.

[8] *Id.*

A similar problem occurred with the Family Educational Rights and Privacy Act of 1974, more often referred to as the Buckley Amendment. It became law before its significance was recognized.[9] The amendment was adopted without any debate. Discussion never arose in formal hearing "to explore potential problems of, or reactions to, the subject matter,"[10] and the amendment's sponsor(s) "seem not to have been adequately prepared to respond to some of the controversial issues raised."[11] [Thus] the problems inherent in the Family Educational Rights and Privacy Act legislation were misunderstood. Similarly, little or no attention has been given to analyzing the effect of competency testing upon education before it becomes law.

Legislators have an obligation to examine carefully even the most politically expedient legislation and to give some thought to problems that could arise as a result of that legislation. The failure to engage in this legislative planning, as far as minimum competency testing is concerned, may be partially responsible for the discriminatory appearance of some competency testing. Thus, citizens have already entered into litigation with school districts and state departments of education over the application of the legislation, and discontent is being expressed by those school officials charged with implementing the competency testing programs. Many of those officials, in fact, have no clear understanding of the intent of the legislation. Inevitably this failure to understand and lack of expertise, combined with the haste to implement competency testing programs, can only result in problems.

An additional concern for both legislators and educators is the need for coordinating different but related pieces of legislation. For example, the Connecticut legislature recently enacted Education Evaluation Remedial Assistance (competency testing), and Comprehensive Planning legislation. Moreover, the legislature has been directed by the State Supreme Court to draft a more equitable state-aid formula. It has been, however, the Connecticut Department of Education, not the legislature that has sought to coordinate the activities generated by the legislation. But the effort is complicated by time constraints contained in the legislation. In addition, to take responsibility for implementing the aforementioned legislation, the Department of Education needs resources beyond those allocated by the legislature. Thus, at least in Connecticut, competency testing may well be destined to fail, with educators charged with its failure.

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[9] Mattessick, *The Buckley Amendment: Opening School Files for Students and parental Review*, 24 Catholic U.L.R., 588.

[10] *Id.* at 594.

[11] Carter, Harris & Brown, *Privacy in Education: Legal Implications for Educational Researchers*, 5 Journal of Law and Education, 459.

THE IMPACT OF COMPETENCY TESTING

The full impact of recent competency testing legislation has yet to be felt by those in the educational community. The legislation is being counted on to eliminate the illiterate high school graduate. "But something has gone wrong."[12] As schools in Oregon and California wrestle with implementing their minimum competency testing programs, dissatisfaction increases. Some believe that minimum competency requirements will reduce "the quality of education to the lowest common denominator and impede the progress of more advanced students."[13] Others express concern that teachers have begun to concentrate almost exlusively on minimum knowledge and competence. Some administrators and teachers find themselves confronted by yet another avalanche of paperwork.

Finally, some critics cite simple (or seemingly simple) test questions as evidence for hypocrisy in competency testing.[14] It is safe to say that the overall impact of competency testing has not impacted uniformly on the school districts where it is being implemented.

The Attendance Judicial Decisions

> "If the law supposes that, said Mr. Bumble, squeezing his hat emphatically in both hands, the law is a ass—a idiot. if that's the eye of the law, the law is a bachelor; and the worst I wish the law is that his eye may be opened by experience—by experience."[15]

Mr. Bumble's message in *Oliver Twist* leads appropriately to a discussion of the legislative and judicial considerations related to the issue of a minimum competency testing.

Legal inquiries into competency testing tend to occur as a result of potential or actual student injury. Thus far these challenges generally concern the potential denial of a high school diploma.

> The challenges are directed towards specific features of existing minimal competency programs such as fairness of testing procedures *vis a vis* instruction, the bias toward certain racial, ethnic and special needs populations, the failure to provide necessary remedial services, the lack of sufficient phase in time,etc.[16]

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[12] Mitzman, *Is Minimum Competency Flunking Its Test?*, Learning, Nov. 1978, 98.

[13] *Id.*

[14] *Id.* at 100.

[15] Dickens, Oliver Twist (Penguin Books, Inc., Maryland, 1975) 461-2.

[16] Airasian, Madaus & Pedulla, *Policy Issues in Minimal Competency Testing and a Comparison of Implementation Models*, Report Submitted to the Policy Subcommittee of the Massachusetts Advisory Committee on High School Graduation Requirements, April 14, 1978, 4.

If litigation is to be minimized these and other factors must be addressed. However, since decisions are being made about, and sanctions are being applied against, individual pupils; this is not the case in our usual testing programs.[17]

To date, only a few lawsuits have actually been filed involving minimum competency testing programs. These suits typically allege that an administrative unit had exceeded its authority or that certain procedural steps in the process are faulty and have the potential of violating the constitutional rights of the petitioners.

One such case already decided is *Brady v. Florida State Board of Education.*[18] In this case an eleventh grade student, John Brady, was required to take both a basic skills and a functional literacy test. He passed the functional literacy test, scoring in the 99th percentile in reading and the 94th percentile in mathematics. Nevertheless, he failed to meet two of the 22 standards tested by the Basic Skills Test identified by the State Board of Education in its Rule 6A-1.941 as required minimum competencies of eleventh graders—he misused the apostrophe and used faulty capitalization. He was, therefore, required to enroll in an 18-week remedial course and was pulled from his regular English composition class. Because the petitioner scored 90 percent on a pre-test, he was thus allowed to take an Independent Study Course.[19]

The petitioner's father wondered how his son could have answered 91 percent of the basic skills items correctly and yet failed the apostrophes and capitalization section. The subsequent investigation disclosed that the Florida State Department of Education imposed these two requirements:

1. Students must master half of the skills and correctly answer 70 percent of the items in each component of the test.
2. A student must achieve one correct answer if there is one item on a particular skill, two correct answers for two items, up to nine. When ten or more items concern a given skill, the student must answer 70 percent correctly.

The petitioner alleged that the cut-off scores had been established without the required public hearing and thus had no legal basis. He further argued that the 70 percent cut-off criteria and mastery performance standard had worked in "tandem to label John G. Brady, as a failure statistic on a state, district, and school level."[20] If the petitioner failed to meet all state standards prior to his graduation, he would not receive a high school diploma.

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[17] *Id.*

[18] Case No. 78-653R, *Final Order*, State of Florida, Division of Admin. Hearings, June 15, 1978, Tallahassee, Florida.

[19] *Id.* at 6-7.

This past June, a hearing examiner upheld the allegation that the scoring criteria that measure basis skills mastery and functional literacy were invalid in that they had not been promulgated in accordance with the Administrative Procedure Act.

Last October, a Memorandum of Law was filed on behalf of John Brady and Quenton Blount in *Brady v. Turlington, et al.*[21] and *Quenton Blount, et al. v. Turlington, et al.*[22]. The petitioners challenged proposed Rule 6A-1.942 (which pertains to the basic skills and functional literacy requirements for high school graduation) contending that the rule constitutes an invalid exercise of delegation of legislative authority on the following six grounds:

1. notice deficiencies
2. invalid retroactive scoring of last year's tests
3. a violation of the one-subject requirement of F.S. § 120.54(8)
4. an invalid delegation of power to the Commissioner of Education
5. the arbitrariness and unreasonableness of the scoring criteria as it relates to the standards tested, and
6. a faulty economic impact statement.[23]

After carefully reviewing the points raised by both petitioners, the hearing examiner found that proposed Rule 6A-1.942 as amended, does not constitute an invalid exercise of delegated legislative authority even though the plaintiffs were substantially affected by the rule.[24] The aforementioned cases were somewhat limited in scope, but it is safe to assume that future litigation will address such issues as educational malpractice, and discrimination. Therefore, I plan to devote some attention here to these two issues before I conclude.

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[20] *Id.* at 11.

[21] Case No. 78-1362R, Petitioner's Memorandum of Law, State of Florida, Division of Administrative Hearings, Tallahassee, Florida, October 13, 1978.

[22] Case No. 78-1363R, Petitioner's Memorandum of Law, State of Florida, Division of Administrative Hearings, Tallahassee, Florida, October 13, 1978.

[23] *Id.* at 6.

[24] Final Order concerning John G. Brady v. Ralph Turlington, Case No. 78-1362R, Tallahassee, Florida, October 23, 1978 and Quenton Blount v. Ralph Turlington, Case No. 78-1363R, Tallahassee, Florida, October 23, 1978.

Education Malpractice

I hope that legislators and educators alike benefit from the experiences of others before hastily adopting competency testing legislation. Some of these experiences bear upon the potential legal issues surrounding educational malpractice, and one such issue is that some of the competency requirements are so low virtually anyone can master them. For example, in one school district tests included such skills as telling time, taking a shower, and constructing a peanut butter and jelly sandwich.

In the past, educators find themselves involved in litigation concerning issues of student care and safety. The whole idea of educational malpractice represents a shift from such issues to educational outcomes. While the courts have not yet ruled in favor of the plaintiffs in malpractice suits involving educators, the question is whether competency testing may provide another opportunity for individuals to seek relief through the judicial system for the apparent failure of educators to discharge their duties. I think it does.

Although the Court did not rule for the plaintiff, the *Doe*[25] case may provide some insight into the direction of future litigation in this area will take. The *Doe* case concerned a young California person who could read only at the fifth grade level when he graduated from high school. The Superior Court of California ruled that mere educational failure was not an "injury" within the meaning of tort law.[26] The Court dismissed the suit on these three grounds. First, the State's sovereign immunity shielded its officers, agents, and employees from liability for injury resulting from negligence.[27] Second, it violated public policy to hold a school district accountable for a duty of care in the discharge of its academic functions.[28] Third, "since there exist no readily acceptable standards with regard to classroom methodology, what constitutes accepted practice in the science of pedagogy cannot be settled."[29]

However, cases such as *Wood v. Strickland*[30] and *Monell v. Department of Social Services, New York City*[31] have begun to erode the doctrine of sovereign immunity, making it possible for Peter Doe-like

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25. Peter Doe v. San Francisco Unified School Dist., 131 Cal. Rptr. 854 (Ct. App. 1976), *hearing denied* Sept. 29, 1976.
26. *Id.* at 855.
27. *Id.* at 861-2.
28. *Id.*
29. Fields & Harris, *Educational Malpractice and The Public Demand for Teacher Accountability*, Planning and Changing, Spring 1978, 12.
30. 95 S. Ct. 992 (1975).
31. 46 U.S.L.W. 4569 (1978).

negligence actions to gain standing. The courts and legislatures "recognized that harsh results may flow from the invocation of sovereign immunity barring relief where justice and common sense demand it."[32] Just as a shift has occurred with respect to immunity, so a growing trend suggests increasing public support for holding educators accountable for the discharge of their pedagogical duties.

Thus, the establishment of minimum competencies and the development of competency tests really mean that a minimal level of performance has in fact been established and that a means for determining the extent to which the student is below or above that particular level has been agreed upon. Now assume that the tests are administered to students in grades 4, 8, and 9. Depending on the design of those tests and on how the results are computed, a gifted student may score below the expected level and a slow student may score well. Who is to blame, the students or the system? The commitment to provide additional support in the form of remediation raises other questions about what constitutes educational "due care" in helping students meet basic standards.

The court's acceptance of future arguments that schools are responsible for the consequences of their acts seems nearly inevitable. Minimum competencies, which were so important in the *Doe* case but did not exist in any other states, have now become widespread. Even those opposed to the *Doe* suit would probably agree that placing a student known to read at the fifth grade level in a college preparatory English class would not be the act of an ordinarily prudent educator. Whether or not courts are disposed to hold such educators responsible, more and more parents are seeking judicial relief. Although the *Doe* case was lost, questions addressing the competence of students who graduate from high school have increased and spread.

Discrimination

Another concern frequently raised about competency testing programs is the extent to which the tests are culturally or linguistically biased. "While substantial numbers of white, middle-class students cannot meet minimal competency standards,"[33] testing programs generally have a disproportionate number of minority students performing below the minimum standard thus school officials in these situations need to be prepared to respond to a strong Title VI claim.

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[32] Abel, *Can a Student Sue the Schools for Educational Malpractice*, 44 Harvard Education Review, 421 (Nov. 1974).

[33] McClung, *Are Competency Testing Programs Fair? Legal?*, Phi Delta Kappan, Feb. 1978, 398.

Utilizing culture free or fair tests is one way of responding to this particular charge. For example, on October 16, 1978, *Debra P. v. Turlington*[34] the first federal case challenging Florida's minimum competency testing was filed in the Federal District Court for the Middle District of Florida, Tampa Division. This case was filed on behalf of ten Black high school students who did not pass the minimum competency test, for themselves and all others similarly situated in the state. Some of the defendants include State Superintendent Turlington, members of the State Board of Education, members of the Hillsborough County School Board and the superintendent of schools. The plaintiffs alleged that the tests and the statute unfairly discriminate against Blacks, that the skills examined are not the same skills taught in the schools and that the test was not valid or reliable. Furthermore, the plaintiffs seek to prove the statute unconstitutional, rather than seek temporary relief or an injunction.

The aforementioned case appears to represent the view of some opposed to competency testing because of the large number of students, non-minority as well as minority, that will be adversely affected. This issue is especially complex in desegregated communities where (on the one hand) one would like to find evidence that students are not regressing yet (on the other hand) one would want to identify those students with particular learning needs. Whether test results, then, represent a means for resegregating students within a school is a question that must be addressed. Such a practice would violate the Constitution, the federal courts having ruled that it is illegal to engage in practices that perpetuate the effects of racial discrimination.[35]

The Supreme Court in *Gaston County, North Carolina v. United States*[36] responded to this issue by agreeing to consider whether a literacy test or education requirement had the effect of denying the right to vote on account of race or color. (The state had maintained a separate and inferior school for its Black residents who were then of voting age.[37]) Justice Harlan, speaking for the majority opinion of the Court, stated that making education available on equal terms would prepare Black youths to meet the literacy standard when they reached voting age. While equalizing educational opportunities is of little value for parents (Justice Harlan said)

> [we] cannot escape the sad truth that throughout the years Gaston County systematically deprived its [B]lack citizens of

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[34] Docket No. 78-892-Civ.

[35] McClung, *Competency Testing: Potential for Discrimination*, Clearinghouse Review, Sept. 1977, 442.

[36] 89 S. Ct. 1720 (1969).

[37] *Id.* at 1726.

> the educational opportunities it granted to its white citizens. "Impartial" administration of the literacy test today would serve only to perpetuate these inequities in a different form.[38]

This principle of "prior effects" was expanded upon in *McNeal v. Tate County School District*,[39] in which the court held that tests administered as a means of establishing ability groups relied on the decisions reached in *Singleton*[40] and *Lemon*[41] cases holding that the school districts in question must have operated for at least several years as a "unitary system."[42] This means operating a single system without ability groups. Several years meant sufficient time to assure that those in the underachieving group had not been produced by yesterday's educational inequities. Hence, a district must show that steps have been taken to eliminate the negative effects of prior segregation by bringing underachievers up to their peers.

A similar instance of the prior effects principle appears in the HEW regulations implementing Title VI of the 1964 Civil Rights Act. These regulations prohibit practices that have the effect of discriminating against individuals on the basis of race, color, or national origin.[43] The Supreme Court applied this standard in *Lau v. Nichols*,[44] by prohibiting a school from carrying forward the effects of its past discrimination. In any event, a minimum competency testing program that is culturally and or linguistically biased apparently will not survive a Title VI challenge.[45]

For example, in the case of *Diana v. California State Board of Education*,[46] Mexican American children had been placed in an EMR class on the basis of Stanford-Binet scores. The crucial point in this case was that the children improved an average of fifteen points on the test scores when they were retested by a bilingual psychologist and allowed to answer in either Spanish or English. Although the case never went to trial, the involved parties agreed that any subsequent testing of non-white students for the purpose of placement would use both students' primary language and English.

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38. *Id.*

39. 508 F.2d 1017 (1975).

40. Singleton v. Jackson Municipal Sch. Dist., 419 F.2d 1211 (1969). *See* Moses v. Washington Parish Sch. Bd., 456 F.2d 1285 (1972).

41. Lemon v. Bossier Parish Sch. Bd., 444 F.2d 1400 (1971).

42. *Id.*

43. Pub. L. 88-352, § 601, 78 Stat. ____ (July 2, 1964).

44. 94 S. Ct. 786, 789 (1974).

45. United States v. Texas, 330 F. Supp. 235 (1971).

46. Civil No. C-70 RFR (N.D. Cal. January, 1970). *Stipulated by agreement of the parties* (Feb. 5, 1970).

Handicapped students represent another group who may experience discrimination as a result of minimum competency testing. While many concerns have been raised regarding minimum competency testing and minorities, other testing problems pertain particularly to the handicapped. One question, for example, it whether handicapped students should be required to pass a proficiency test as a requirement for receiving a high school diploma. The other question concerns maintaining different educational standards for handicapped students. The decision regarding differentiated diplomas and different standards must be addresed with caution.

Exempting handicapped students from the testing poses yet another set of problems. Some handicapped students obviously could benefit from participating in the testing and the remediation that follows. Accordingly, Public Law 94-142[47] stipulates the development of Individualized Education Programs (IEP) for each handicapped student. Thus, the IEP should be helpful in determining whether handicapped students participate in competency testing programs.

FUTURE DIRECTIONS

In many respects, those aboard the minimum competency testing bandwagon are much like Stripe, a caterpillar in Trina Paulus's *Hope for the Flowers*. When he asked, "Do you know what's happening?" Stripe replied,

> I just arrived myself. Nobody has time to explain; they are so busy trying to get wherever they're going up there. But what's at the top? No one knows that either but it must be awfully good because everybody's rushing there.[48]

The bandwagon should slow down so that those aboard can take stock before too much time and energy is lost and too much hardship and confusion accumulate.

The public fervor over competency testing programs not only exacerbate some basic conflicts within the American society and educational profession, but it also points out the problems inherent in relying on legislation to precipitate change before that proposed change is completely understood by those charged with its implementation. The courts have simply not yet been defined with sufficient precision the legal guidelines for minimum competency testing programs. Thus, the scope of the issues destined to arise as a result of competency testing remain uncertain.

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[47] The Education for All Handicapped Children Act.

[48] Paulus, *Hope for the Flowers* (Paulist Press; New York, 1972) 20.

Some form of student assessment is probably needed, but the question is whether minimum competency testing is the answer. Since this question remains, educators must carefully scrutinize minimum competency testing programs if the inevitable legal challenges to this testing are to be withstood. More concretely, educators and legislators alike should be willing to learn from the limited number of available cases as well as those that emerge in the future so that injuries to students are minimized.

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Teaching Moral and Spiritual Values in Public Schools: Legal Implications

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INTRODUCTION

The month of November, 1978 will be remembered, not because of the good things that happened—a national election in which voters were asked to respond in terms of moral judgments,[1] Veterans' Day, when we honored the dead, and Thanksgiving, when we paused as a nation to offer thanks to a Supreme Being for our many blessings as Americans. On the contrary, like an earlier November (1963) when an American president was shot down, the month just closed will achieve a place in history as that time when the civilized world was shocked and horrified by a senseless mass suicide-murder in the jungles of Guyana.

What makes the event all the more horrifying was that it was committed in the name of religion.

How could such a thing happen?

Debate on that question must be left to the future. Suffice it to say at this point that the U. S. Supreme Court has indicated the main-stream insofar as church and state are related: "... we are a religious people whose institutions presuppose a Supreme Being. ... the right to believe is unlimited .... In matters of religion, the government must remain forever neutral . . . .[2] Neither the state nor the federal government can aid one religion, aid all religions, or prefer one religion over another . . . .[3] (The government) may not make a religious observance compulsory.[4] Neither the state nor the federal government may set up a church . . . . No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion . . . . In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between church and state.' "[5]

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[1] On November 7, voters in five states were asked to decide whether gambling should be legalized, while those in three states were asked to determine the civil rights of homosexuals. In two states, questions on consumption of alcohol and the death penalty were on the ballot, certainly issues that depend on the moral convictions of registered voters. In other states, voters were asked to decide whether smoking should be banned in public places, and whether the state should restrict distribution of pornographic materials.

In our zeal to keep church and state separated, we have created *the modern dilemma*:[6] how can a government perpetuate its own existence by inculcating right values for citizenship among the young while at the same time it assiduously avoids conflict with the First Amendment? Our treatment of blacks has received considerable attention so that it is not now our greatest social problem; how to balance these two religious interests is far more pressing today than the race problem in American culture.

The present position of the Supreme Court could be summarized in the hypothesis that it is better to restrict religious freedom in schools than to established a religion.[7]

No one would seriously urge that government should intervene in the more than 2,000 religious sects and cults in the United States. We may not agree with this or that particular brand of cultism, but we would protect to the death another's right to believe as he will. To a more limited extent, we would also agree that he has the right to practice his religion in the absence of a clear and present danger or invasion of the rights of others. From bitter experience, our forefathers knew that fusion of church and state leads only to a cessation of religious liberty. And so they erected a wall and divided sectarian and secular matters accordingly.

The state has, of course, a vital interest in religion—at least, in those values that derive from religious sources, and that help make us better Americans. We look to our schools as a first line of defense against false prophets and foreign ideologies. The public schools for over two hundred years have been the means we used to transmit values important to citizenship, so that our way of life might survive. Without these attitudes, appreciations, and understandings, we could not long endure as a representative democracy.

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[2] Zorach v. Clauson, 343 U.S. 306 (1952).

[3] Everson v. Board of Educ., 330 U.S. 1 (1947).

[4] 343 U.S. 306.

[5] 330 U.S. 1.

[6] In 1944, the Swedish economist Gunnar Myrdal published his two-volume work, An American Dilemma: the Negro Problem and Modern Democracy. The work, which was widely acclaimed, contained a wealth of sociological, legal and anthropological data and emphasized the great gap between the nation's ideals and practice in treatment of blacks.

[7] Lemon v. Kurtzman (Lemon I), 403 U.S. 602 (1971).

This paper will explore the legal ramifications of this modern dilemma—how state-taught moral and spiritual values must pass Constitutional muster, what has been done, and what can be done in the future, to avoid needless entanglement or denial of religious freedom. The point of view throughout is that of the schools attorney working with the superintendent and the local board of education.

Teaching moral and spiritual values in public schools poses several related problems of a legal nature. What *are* values? Or, more to the point, what are *moral* and what are *spiritual* values? Are these values identical with those that must be learned for successful citizenship? Can "values" really be "taught"? From a legal standpoint, are some values to be considered *mandatory*, others *permitted*, and still others *prohibited* by and in the public schools?

Over the years, parents and local boards have devised four ways of imparting values in the young. The law now recognizes that 1) parents may choose *to withdraw* their children from public schools and either enroll them in private or parochial schools, or instruct them at home; 2) parents may petition the board *to release* their children for short periods of time during school hours to receive religious instruction away from school property; 3) parents may ask church and state *to cooperate* in shared-time programs; or 4) parents may wish their children *educated in public schools*, whereupon the local board has the responsibility of building moral and spiritual values into the curriculum.[8] I propose to examine each of these schemes in turn, with the single *caveat* that the secular duty of the schools is clear: to produce in youth those attitudes and appreciations related to their duties as citizens, i.e., to obey the laws, contribute to the general welfare through payment of taxes, to serve in the armed forces, to vote, to serve on the jury and to participate meaningfully in the operation of the government.[9]

First, a look at values in general. Oscar Wilde's definition of a cynic applies here: a cynic is one who knows the cost of everything, the value of nothing. Values are non-material, desired outcomes, goals, or objectives to be met. Considering the impressionable age at which children are exposed to school, everything the school does is loaded with values. Indeed, even if we were to agree that we should strive for a "value neutral" environment for the child, we would still be suggesting that the value we wish to teach is neutrality. Children enter school with a full set of values, some of which have to be replaced with more stable virtues. Clearly the school does not have a monopoly on the teaching of values—many values when learned are really more "caught" than "taught." In such a climate of uncertainty, one must look to the various parental options to see what constraints, if any, have been placed on the teaching of moral and spiritual values in the public schools.

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[8] For obvious reasons, voucher plans are omitted from these schemes.

[9] *See*, e.g., Sirica, *The Characteristics of Good Citizenship*, 60 NASSP Bulletin 12, (May, 1976) for an excellent account of the duties of the citizen and how secondary school principals can more effectively contribute to the building of those values in the public schools.

The establishment clause prohibits a state from setting up a church. Still, some state legislatures hope to legislate teaching of moral and spiritual values and bring all children into the same mold. In Florida, the legislature, for example, enacted a statute that, among other things, required teachers and administrators to "inculcate, by precept and example, the principles of truth, honesty, and patriotism and the practice of every Christian virtue" in their students.[10] As one might expect, the statute was challenged as an establishment of the "Christian" religion. The federal district court denied relief and the parents appealed. The U.S. Circuit Court of Appeals for the Fifth Circuit held the statute unconstitutional, specifically those provisions for daily Bible reading and distribution of Gideon Bibles. On the issue of teachers inculcating every Christian virtue in their charges, the Circuit Court divided equally, thus affirming the district court's decision that held the statute constitutional. The opinion of the judges who would have found the statute unconstitutional did concede, in *dicta*, that probably it would be constitutional if the word "Christian" were to be removed.[11] Because of the importance of the case to school management, the Supreme Court will be asked to grant *certiorari* on the question of whether a state, precluded from establishing a church, may instead make reference in a statute to certain "virtues" it deems of value and attach a religious connotation to those virtues.

The Supreme Court ruled in 1962 that a state may not compose a prayer and require its recitation in the public schools.[12] Since that decision, attempts have been made—some of them organized, most of them abortive—to "put God back in the public schools." An attempt to legislate a solution is expected to be tested in court in December, in the Commonwealth of Kentucky. There, citizens are challenging a statute and have won a temporary injunction restraining its enforcement. The objectionable statute provides that in each of the Commonwealth's 35,000 elementary and secondary public school classrooms, there be posted a "durable, permanent"[13] copy of the Ten Commandments measuring at least sixteen inches in width by twenty inches in height. Since no public funds were appropriated for the job, it is still unclear how the classrooms are to be furnished, since only a small amount of money has been collected from voluntary contributions.[14] The bill encountered little difficulty in the Kentucky Legislature, winning approval in the House by a vote of 81-4 and in the Senate by an equally overwhelming 32-4 vote. Like motherhood and apple pie, no one, it seems, was about to oppose it. Did the legislators believe (even hope?) that once enacted, the law would soon be forgotten? The case is entitled *Stone v. Graham*[15] and should make for interesting comparisons once it reaches the courts on the merits.

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[10] Fla. Stat. Ann. § 231.09(2) (West).

[11] Meltzer v. Board of Public Instr. of Orange County, 548 F.2d 559, (Fla. 1977); *affirmed*, 577 F.2d 311, (5th Cir. 1978).

[12] Engel v. Vitale, 370 U.S. 421, (N.Y. 1962).

HISTORY OF THE PROBLEM

Legal problems don't just happen—they have a historical development that sometimes sheds light on trends to be expected in the future. The legal problems associated with teaching moral and spiritual values in the public schools developed within three distinct time periods. The first period dates back to the Olde Deluder Satan Act and continued through the mid-1800's when states took over formal education at public expense. This early period was characterized by the theme of religious literacy. The approach was head-on, direct, overt and explicit. Teachers were expected not only to teach the fundamentals, but also the catechism[16] as well. Some teacher's contracts called for preaching the sermon if the minister became ill, and even helping to dig a grave if somebody died. Truly, old Ichabod Crane was more than merely a member of the teaching staff: he was expected to be a monument to virtuous living as well.

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[13] Language from the statute.

[14] 6 School Law News 11 (Nov. 10, 1978) reports that the statute further provides that in small print beneath the Commandments is to appear the notation that "the secular application of the Ten Commandments is clearly seen in its adoption as the fundamental legal code of Western civilization in the common law of the United States," an obvious attempt to save the statute's constitutionality by establishing its necessity.

[15] ___ S.W.2d ___ (1978).

[16] Defined as "an elementary book containing a summary of the principles of the Christian religion."

The second period was influenced by Horace Mann and William H. McGuffey. It had two themes: the production of citizens from immigrant stock from Europe and the continuation of the religious literacy emphasis from the first period. Literacy for citizenship and for foiling Old Satan were powerful forces toward building moral and spiritual values in kids of the period. On occasions when the United States was involved in war (1898, 1914, 1940), Manifest Destiny and patriotism (if indeed, not nationalism) were dominant themes. When the U.S. failed to join the League of Nations following World War I, patriotism, isolationism and nationalism flourished as the basis of our national creed. Following World War II, the United States became a member of the United Nations. It then became unacceptable to flaunt our nationalism before the have-not nations, and the themes became brotherhood of man and detente. The most powerful book, next to the Bible, in this second period was the Eclectic Reader of Dr. William McGuffey. It sold more than 120 million copies over a span of eighty years. It not only taught the fundamentals (A—B—C's) but moral lessons as well.[17] "In Adam's fall/we sin-ned all," began the alphabet and continued on down to "Zachaeus he did climb a tree/his Lord to see." Just before he died, Dr. McGuffey confided to his students that he had written more than 10,000 sermons in his day "without once reducing a single one of them to paper."[18]

Throughout the second period, states were at liberty to decide how they would deal with church-state relations in the public schools. Before the Supreme Court overruled the New York Regents' prayer[19], several states *required* prayers and Bible reading in public schools, others *permitted* such practices, and still others *prohibited* any form of religious observances. We were a divided nation needing guidance, when in 1962, the Court found mandatory recitation unconstitutional.

Prayers of a voluntary nature were declared suspect in later decisions if the board used compulsion to achieve participation in the program.[20]

Near the heart of moral teaching of any kind must be an individual who displays by precept and example those qualities needed in the citizen of tomorrow. The image that appeared in the second period was none other than that renowned spinster, Abigail Grundy. Her dedication, patriotism, and self-sacrifice were living precepts for her students to emulate. Truly, during the period between 1840 and 1960, Miss Abigail Grundy was more than merely a member of the teaching staff: she was expected to be a monument to virtuous living as well.

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[17] K. H. Hansen, Public Education in American Society (Englewood Cliffs: Prentice-Hall, 1956) 8-9, 72.

[18] William Holmes McGuffey (1800-1873) produced his first and second readers on contract in 1836 and followed in the next year with his third and fourth readers. His influence on the moral development of generations of scholars can hardly be overestimated.

[19] "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our country." Engel v. Vitale, *supra* at n.12.

[20] Hunt v. Board of Educ. of Cty. of Kanawha, 321 F. Supp. 1263 (W. Va. 1971).

The third period dates from the Warren Court years (1953-1969) and the theme is constitutional rights for all individuals including children, who have gone from "chattels" and "dependents of tender years" all the way to "persons" under the Constitution.[21] A line of Supreme Court decisions going back to 1923[22] clearly sets the theme: the child has an unlimited right to learn, to know, and to be informed. In this line of cases is *West Virginia State Board of Education v. Barnette*[23], in which the Court reversed its earlier ruling and held there are more important considerations than patriotism in inculcating American principles in the young. The State Board of Education required that children in public schools salute the flag and provided further that failure to do so "shall be regarded as an act of insubordination, which shall be dealt with accordingly." In overruling the board, and holding for the children, the Court noted that boards of education are no exception to the need for government to observe the free exercise clause. Justice Jackson, for the majority, wrote: "That they (local boards) are educating the young for citizenship is reason for scrupulous protection of constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes." Thus, even though we are at war, religious conscience is a top priority civil right to be protected from governmental intervention, particularly in the public schools. "The problem," wrote Jackson, "is whether under our Constitution compulsion as here employed is a permissible means for achieving national unity."

In concluding that state compulsion must yield to individual freedom of conscience, Jackson reasoned that

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith

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[21] Tinker v. Board of Educ. of Des Moines, 393 U.S. 503 (Iowa 1969). The Court held that children in school as well as out are "persons" under the Constitution and do not shed their constitutional rights "at the schoolhouse gate."

[22] Meyer v. Nebraska, 262 U.S. 390 (1923).

[23] 319 U.S. 624 (1943).

[24] Minersville School Dist. v. Gobitis, 310 U.S. 586 (1940).

> therein. If there are any circumstances which permit an exception, they do not now occur to us. We think the action of the local officials in compelling the flag salute and pledge transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.

The key word in this and related decisions is "compulsion." But what if the prayers are voluntary, the utterances straight from the heart? Even then, school officials may be barred from permitting religion-related practices, simply because voluntariness cannot be claimed if the board has taken any sort of action either to foster or to inhibit religion. Thus, "voluntary" prayers and Bible reading have been constitutionally banned from the public schools even though there is no requirement of teacher or student participation, the exercise is under student control, and there is no prescription as to the form of the exercises.[25] Because meeting on school property to hold religious meetings may in and of itself give "tacit" approval to a religious practice, the board must avoid "the very appearance of evil" in its relationship to religion.[26]

At this point, we look in vain for the teacher image to carry the burden of teaching moral and spiritual values in public schools. The mirror is blurred—is this Albert Shanker of the UFT, or the ghost of Ichabod Crane and Miss Grundy? No one person emerges to serve as an exemplar. Teachers are acting in groups to search out their own interests and seem uninclined to counsel students on those values. Without a focused image of a teacher on the staff to assume the burden, the problem of how to develop moral and spiritual values takes on a new dimension.

This vacuum, together with busing and other problems, may have been what has caused parents in increasing numbers to withdraw their children from the public schools, or to demand a strengthening of the moral-spiritual component of the curriculum. Indications are that only the tip of the iceberg is in sight—that coming months will reveal just how large this problem is and what arrangements can be made to bring it to a peaceful solution.

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[25] See in general R. Hamilton & E. Reutter, Jr., The Law of Public Education (2nd ed., Mineola, N.Y.: Foundation Press, 1976) at 27-28 for an excellent account of this concept.

[26] *See* Alaska CLU v. Wallace, 331 F. Supp. 966 (Ala. 1971) (statute requiring Bible reading daily violates Establishment Clause); Mangold v. Gallatin School Dist., 438 F.2d 1194 (3rd Cir. 1971) (school board enjoined from allowing voluntary Bible reading and nondenominational mass prayers in Pa.); Hunt v. Board of Educ., 321 F. Supp. 1236 (W. Va. 1971) (federal court upholds board's refusal to allow students to use school premises for voluntary group prayer meetings); and Goetz v. Ansell, 477 F.2d 636 (N.Y. 1973) (board enjoined from disciplining student for remaining seated during flag salute ceremony).

PARENTAL PREROGATIVE TO AVOID PUBLIC SCHOOLING

We turn now to the four plans, the first of which is for parents to withdraw their children from public schools and instruct them at home or in private and/or parochial schools of their choosing. Colonial parents had full responsibility for educating their children, but when the states took over the task, the question arose as to who should control education at public expense. The solution was a compromise.[27] The Supreme Court held that educating the young is a joint endeavor—the parents retaining possession of the child's body, mind, and soul.[28] The State, said the Court, may reasonably regulate all schools, but may not require that children attend public schools only. So long as the schooling they receive is "equivalent" to that offered in public schools of that general area, parents may choose to avoid public school attendance for their children. The legal problem, of course, was far from settled law: What is "equivalency" for purposes of the State? There is a mounting clamor in the courts to decide just what equivalency legally means. On October 4, 1978, Kentucky school officials lost the first round of a legal battle to establish minimum standards for Christian academies,[29] while North Carolina school officials fared better in a court ruling handed down in September.[30] Both states have experienced stiff resistance from religious fundamentalists who insisted that any regulation of teacher certification, curriculum or other standards for private schools violates their religious freedom rights.[31] Both cases are on appeal.

In more than fifty years following *Pierce v. Society of Sisters*, only two major cases have been brought against public school attendance on religious grounds. The most famous of these is *Wisconsin v. Yoder*,[32] which is so well known as to make an explanation of it here superfluous, except perhaps to point out that the Supreme Court held that a compulsory attendance act that interferes with a parent's religious views is unconstitutional, unless the State can demonstrate an overriding public purpose to be served.[33] The Court upheld tutelage at home by Old Order Amish parents on the grounds that it fitted the children for life on the farm. Since the State failed to show a transcendental state interest, *Yoder* was the first Supreme Court exception to compulsory attendance laws in the United States.

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[27] Pierce v. Society of Sisters, 268 U.S. 510 (Ore. 1925).

[28] *E.g.*, the parent still retains control over who shall treat his child medically if at all, who shall probe deep into his brain through psychiatric penetration, and who shall instruct the child in religious matters. What remains for the school is the "education" of the child in those values and virtues thought necessary to citizens in later life after school days are over.

[29] Kentucky State Board of Education v. Hinton, ____ S.W.2d ____ (1978).

[30] State v. Columbus Christian Academy, No. 78CVS1678.

[31] 6 School Law News 6 (Oct. 13, 1978).

[32] 406 U.S. 205 (Wis. 1972).

The second major case is *State v. Whisner*[34] in which the conviction was reversed of parents who sent their children to nonpublic religious schools that did not meet the Ohio minimum standards for private schools. The state required that the children be taught using an approach to social problem solving involving mutual exchange of ideas and compromise among participants. The parents contended that this requirement amounted to teaching a philosophy of "secular humanism," an offensive idea to them because they taught their children that all personal or social dilemmas should be reconciled only through prayer.[35] The Ohio Supreme Court agreed that the state requirements did indeed infringe on the right of free exercise of religion. To insist in incorporating into the curriculum such "secular humanism" social creeds as a prerequisite to private school approval, said the court, "would effectively eradicate the distinction between public and non-public education, and thereby deprive these (parents) of their traditional interest as parents to direct the upbringing and education of their children."[36]

The *Whisner* case will loom larger as precedent as states face up to the need to develop more realistic guidelines for parents to follow in setting up private schools. Most states will not tell parents ahead of time whether the schools they propose to establish will meet minimum standards, but most merely say, "Go ahead and set up your schools and we will then tell you whether they meet our minimum standards in this State."[37] In such instances, parents may have a point when they complain that the lack of clear-cut guidelines deprives them of due process of law if not indeed free exercise of religion.

An emerging legal issue relates to home instruction. As more and more parents become disenchanted with the public schools, they will tend to challenge limits now placed on home instruction in lieu of public school attendance. Thirty-two states currently permit home instruction in fulfillment of compulsory attendance laws. Some of these, including Massachusetts, require that children who are instructed at home be taught "in a manner approved in advance by the local superintendent or school committee." Recently, a parent in the Amherst (Mass.) school district, felt stymied when he could not obtain approval of the local superintendent for his home instruction plan, and he sued to force its acceptance. The father, who had a Ph.D. in biochemistry, had developed the plan which was examined by experts who held it to be "the equivalent of a first-rate private academy both in its tutorial system and in the curriculum." The case is currently in litigation.[38]

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[33] 6 School Law News 9 (May 12, 1978); 6 School Law News 5 (Oct. 13, 1978).

[34] 351 N.E.2d 750 (Ohio 1976).

[35] Yearbook of School Law 1977 (P. Piele, ed.) at 118.

[36] State v. Whisner, *supra* at 768.

[37] *See* NOLPE School Law Reporter, S/O 76 at 27; E. Clinchy & E. Cody, *If Not Public Choice, Then Private Escape*, 60 Phi Delta Kappan 270 (Dec. 1978); *Federal Intervention in Cults? Pro and Con*, 85 U.S. News and World Report 29 (Dec. 11, 1978).

Justice Douglas wrote in *Zorach v. Clauson*[39] concerning church-state issues that "the problem is one of degree." Such a vague standard gives little solace to the attorney in predicting the outcome of most religious cases, and opens the door wider to decisions based on subjective—rather than objective—criteria.

Clearly, the alternative-route plan by which parents may avoid enrolling their children in the public schools seems a veritable thicket for future litigation. Although Americans United For Separation of Church and State declared in early 1976 that the anti-voucher plan fight was won,[40] the parochial battle appears far from over, and probably will not conclude until the whole issue of tax funds for private and parochial schools is finally laid to rest.[41]

RELEASED TIME FOR RELIGIOUS INSTRUCTION

The second scheme for teaching moral and spiritual values involves the release of children from the public schools during school hours to attend the church or synagogue of their choice. A considerable literature exists on this plan, including at least two U.S. Supreme Court decisions.[42] Surprisingly, the issue is far from settled law, although some guidelines are evident. The Court means what it says when it reads the establishment clause of the First Amendment. In *McCollum*[43], Justice Frankfurter wrote, "The public school is at once a symbol of our democracy and the most pervasive means for promoting our common destiny. In no activity of the State is it more vital to keep out divisive forces than in its schools, to avoid confusing, not to say fusing, what the Constitution sought to keep strictly apart (church and state)."

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[38] Arons, *Is Educating Your Own Child a Crime?*, 5 Sat. Review 16 (Nov. 25, 1978). *See also Teaching Children at Home*, 112 Time 78 (Dec. 4, 1978) for an account of difficulties experienced by parents who wish to teach their own children at home.

[39] 343 U.S. 306, 312 (1952).

[40] *End of the Line for Vouchers*, 29 Church and State 3 (June, 1976).

[41] Moynihan, *The Case for Tuition Tax Credits*, 60 Phi Delta Kappan 274 (Dec., 1978); Hollings, *The Case Against Tuition Tax Credits*, 60 Phi Delta Kappan 277 (Dec., 1978).

[42] *Ex rel.* McCollum v. Board of Educ., 333 U.S. 203 (1948) (a released time plan declared unconstitutional in Champaign); Zorach v. Clauson, 343 U.S. 306 (1952) (A New York City plan approved).

The test of constitutionality for released time programs consists of three parts: 1) whether the location of the instruction is on or near school property; 2) whether there is an expenditure of public funds or effort to support the program from school employees; and 3) whether the school promotes either directly or indirectly the practice of religion among students.[44] The test derives from *Zorach v. Clauson*[45] in which the Court found that a school released time program held off school property and which involved negligible amounts of time and effort on the part of employees was constitutional.

The Court emphasized in *Zorach* that the First Amendment does not require separation of church and state in every and all respects. Rather, it defines the manner and specific way in which there shall be no concert, no union, nor dependency one on the other. This is the "common sense"[46] of the matter; otherwise, State and religion would be alien to each other—hostile, suspicious, and even unfriendly. The State may not establish a church, but it also may not inhibit the free exercise of those that already exist. The term the Court used was *neutral*—neither advancing nor inhibiting religion in any way.

The Harrisonburg (Va.) Public Schools maintained a released time program in which public school students were released during school hours to attend religious instruction across the street from the school in a mobile trailer parked on a public street. Religious classes were integrated into the schedule so that different children were dismissed to receive instruction throughout the school day. The federal district court[47] held that the plan created "an impression of tacit endorsement of the program" by the school district, and was therefore unconstitutional. On appeal, the Fourth Circuit Court reversed, and held that the school's cooperation was "a largely passive and administratively wise response" to the secular wishes of the students and their parents.[48]

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[43] *Supra*, note 42.

[44] In ex rel. Holt v. Thompson, 225 N.W.2d 678 (Wis. 1975) the state supreme court upheld a released time program using the *Zorach* test.

[45] 343 U.S. 203 (1948). *See also* Boles, *Persistent Problems of Church, State and Education*, 1 J. of Law & Euc. 601, 627 (Oct., 1972); Thomas, *Released Time and Religion in the Public Schools: A Legal Perspective*, 6 NOLPE School Law Journal 29 (1976).

[46] The Court's words.

[47] Smith v. Smith, 391 F. Supp. 443 (1975).

From these and related cases comes the observation that released time programs are considered by the courts as "secular" services allowable in the interest of building future citizens. However, since the limits are matters of degree rather than legal absolutes, one should take nothing for granted in deciding whether a particular plan will pass constitutional muster.[49]

SHARED TIME PLANS

Shared-time programs are the third scheme for imparting religious and spiritual values to the young. These plans vary widely, and are difficult to categorize, since there is a paucity of cases on the subject, and because the practices vary widely from school to school. Shared time is not as widely practiced as released time. The reason is not difficult to find: states almost universally award state per-pupil aid on the basis of attendance, thus cutting in half the amount of state aid that the local district receives (where the student attends parochial or private school one-half day and the public school the other half.) Since the cases are not numerous they must be judged on a case-by-case basis.[50]

The test of constitutionality for shared time programs is that developed by the Supreme Court in *Lemon v. Kurtzman*[51] and consists of three parts:

1) the statute or arrangement must have a secular purpose;

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[48] Smith v. Smith, 523 F.2d 121 (4th Cir. 1975).

[49] State *ex rel.* Holt v. Thompson, *supra* note 44.

[50] State *ex rel.* School Dist. v. Nebraska State Bd. of Educ., 195 N.W.2d 161 (1971). The Nebraska Supreme Court held that the rental by a local district of one and one-half rooms in a parochial school to conduct a Title I project was not unconstitutional. Dissenting justices vigorously objected to the arrangement as violative of both the state and federal constitutions; Fisher v. Clackamas Cty. Sch. Dist., 507 P.2d 839 (Ore. 1973). A shared time plan under which pupils in parochial schools were also enrolled in public junior high school was declared by the Oregon Court of Appeals to be unconstitutional; Americans United For Separation of Church and State v. Paire, 359 F. Supp. 505 (N.M. 1973). The School District's plan to lease a school building was held to be unconstitutional since the arrangement would create and finance an artificial school within a church school and create impermissible entanglement of church and State; Resnick v. East Brunswick Twp. Bd. of Educ., 343 A.2d 127 (N.J. 1975). An arrangement in which a local school district rented space from a Catholic sectarian institution for public school classrooms was upheld, even though some classrooms in the same building were used for the Catholic school; Citizens to Advance Public Education v. Porter, 237 N.W.2d 232 (Mich. 1976). Action to enjoin three school districts from operating a shared time program was dismissed. The Michigan Court of Appeals ruled that the plan passed the three-part *Lemon* test and was not, therefore, repugnant to the First Amendment.

[51] 91 S. Ct. 2105 (1971) commonly referred to as "Lemon I."

2) its principal or primary effect must be one that neither advances nor inhibits religion; and
3) the statute or arrangement must not foster "an excessive governmental entanglement with religion."[52]

To these requirements one should add the *caveat* that any shared time arrangement must not be permanent but temporary only, and you have the essence of the constitutional test for shared time programs. Despite these seemingly objective measures, there still remains considerable room for judicial subjectivity in this very sensitive area of the law.

IN-SCHOOL INCULCATION OF MORAL AND SPIRITUAL VALUES

The fourth scheme for imparting values to children is to build these components into the public school curriculum. More than nine out of every ten American children receive their education by this means. As a people, however, we are divided on the question of how these values ought to be taught. There are two camps, and they are far apart. One camp urges more repressive measures—elimination of frills, no more sex education, weed out "dirty" books, and place more emphasis on law and order. The opposing camp, which has the support of the Supreme Court, holds that children are "persons" under our Constitution, and should be included in the making of decisions that affect their lives in school.[53] Clearly a local board must implement the climate most preferred by local patrons—who are now more vocal since money is scarce—in deciding how to go about teaching moral and spiritual values in the public schools of the district.

Traditionally, the general climate in public schools has been more moral than intellectual in nature. Teachers have been coached to accept teaching by example as a part of the job. Most realize that they may not use their classrooms as a forum for indoctrination.[54] Legally, American public schools prepare children for citizenship as well as protect them against alien and foreign ideologies.[55] There are several ways that this can be accomplished without coming into conflict with the First Amendment. Four of these approaches will be examined from the many now in use.

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[52] The quote suggests that *some* entanglement is allowable, but that "excessive" entanglement of the State with religion is unacceptable. The Supreme Court clarified this concept somewhat in Wolman v. Walter, 433 U.S. 229 (1977). Approved were four practices: 1)loaning of textbooks to parochial schools by the State; 2) administering standardized tests to parochial school students; 3) helping with treatment of speech and hearing problems; and 4) taking care of students' dental needs, all "secular" objectives for which tax moneys could be used. Two forms of state aid were rejected by the Court: 1) spending state money for instructional materials and equipment, and 2) permitting parochial school students to take field trips to museums and other points of interest at public expense. *See* M. Nolte, *Public Aid to Religious Schools: What the Supreme Court Said—and Didn't Say*, 165 Am. Sch. Bd. J. 35 (Jan., 1978), and M. Nolte, *Why the 'Ban' on 'Religion' in the Public Schools is Backfiring on Our Children*, 164 Am. Sch. Bd. J. 24 (July, 1977).

[53] Tinker v. Des Moines School Board, 391 U.S. 503 (Iowa 1969).

The Ethics Education Program in the Salt Lake City (Utah) Public Schools is based on the moral principles contained in the great American historical documents. The program seeks to teach moral and spiritual values in a non-religious way be emphasizing "ethics" necessary for good citizenship. The plan, developed by teachers and parents in the system, has received wide publicity in a religiously pluralistic setting.[56]

Another approach is that advocated by the Public Education Religion Studies Center (PERSC) in Ohio.[57] The Center has a well-developed curriculum for elementary and secondary students featuring such courses as The Bible as Literature and Comparative Religions of the World. The approach is designed to avoid sponsorship of a particular religion by having students study *all* religions. The plan has the sanction of the courts, and is widely used in the midwestern states, including Indiana and Illinois.

A third approach is advocated by the Special Committee on Youth Education for Citizenship of the American Bar Association[58] and the National Center for Law-Focused Education.[59] Emphasis is on the "law-related" curriculum and materials are available from both these sources, including games, bibliographical materials, curricula, and audio-visual supplies.

Finally, there is the values clarification movement[60] based on the use of "cases" involving moral judgments that must be made by children who participate in decision-making pilots in public schools. Values are taught in operational terms and the approach is psychological in that it aims at moral development among those who are given opportunities to choose what they would do in given situations.[61]

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[54] Literally, "to close the students' minds to outside ideas."

[55] M. Nolte, *From Scopes to Epperson and Beyond: Academic Freedom in the Schools*, 3 NOLPE School Law Journal 37 (Spring 1973).

[56] For information on the Ethics Education Program address Salt Lake City School District, 440 East First Street South, Salt Lake City, Utah 84111.

[57] Address W. E. Collie, Codirector, PERSC, Wright State University, Dayton, Ohio 45431 for further information. *See also* J. Panoch, *Religion Studies in the Public Schools*, New Directions in School Law (Topeka: NOLPE, 1976) at 41-47. *See also* N. Piediscalzi & W. Collie (eds.) Teaching About Religion in Public Schools (Niles, Ill.: Argus Communications, 1977) 258 pages, $3.95.

[58] 1155 East 60th Street, Chicago, Illinois 60637.

[59] Law in American Society Foundation, 33 North LaSalle St., Chicago, Illinois 60602.

[60] *See generally* D. Casteel & R. Stahl, Value Clarification in the Classroom: A Primer (Pacific Palisades, CA: Goodyear Pub. Co., 1975) paper about 160 pages.

There is an increasing interest in silent meditation in public schools. Silent meditation for one minute daily is specifically required in four states and three others are considering such legislation. Three cases have sanctioned the practice, while one has barred it in public schools.

In *Gaines v. Anderson*[62], a Massachusetts statute was challenged that required one minute of silence daily "for meditation and prayer." The case was dismissed on the grounds that the children were not coerced but were free to spend the minute in silence if they chose. Similarly, a New Hampshire statute authorizing voluntary meditation and a pledge of allegiance was held not to violate the Constitution.[63] However, in *Malnak v. Maharishi Mahesh Yogi*, [64] the practice of Transcendental Meditation (TM) was held to be violative of the establishment clause because it contained religious principles not present in other meditation techniques of a secular nature.[65] The net effect of the *Malnak* ruling may be to stifle TM course experimentation in states other than New Jersey where experiments are currently being conducted.

Where prayers are offered as an incidental part of the proceedings, they cannot be considered sectarian, but are secular in nature, such as for example in baccalaureate exercises, commencements, and similar gatherings.[66] Courts are inclined to allow such ceremonies being held in churches where these buildings are the only ones that could comfortably accommodate those attending. The Supreme Court declined to review the single case in point involving sectarian baccalaureate exercises.[68]

As local institutions, boards of education are sensitive to the wishes of parents, although not all parental requests need be granted. For example, parental objections to proposed sex education and family life courses were judicially dismissed where opportunity was given for alternative choices.[69] Likewise, parental objections on religious grounds to the use of audio-visual projections, recorded music and role playing were overruled even though there was evidence that the parents strongly believed that these modern techniques were evil.[70]

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[61] *See generally* L. Kohlberg, *The Cognitive-Developmental Approach to Moral Education*, 61 Phi Delta Kappan 670 (June 1975) for a description of the moral stages through which children pass in attaining maturity. The Director of Harvard's Center for Moral Education describes the work of the Center in Pittsburgh and Boston area schools.

[62] 421 F. Supp. 337 (Mass. 1976).

[63] Opinion of the Justices, 307 A.2d 558 (N.H. 1978).

[64] 440 F. Supp. 1284 (N.J. 1977).

[65] *See Transcendental Meditation Barred from Schools*, 30 Church and State 3 (Dec. 1977). Americans United states that more than $300,000 in federal, state and local funds had been spent to promote TM experimentation as of May, 1976.

[66] NASSP Newsletter (June 1976).

[67] Miller v. Cooper, 244 P.2d 520 (N.M. 1952).

[68] Chamberlin v. Dade Cty. Bd. of Pub. Instr., 143 So. 2d 21 (Fla. 1962).

In Kanawha County (W. Va.) parents objected to the board's choice of books and sought to have them barred from public schools as a violation of their religious freedom and family privacy. The federal district court denied relief. "The First Amendment, while promising the unfettered exercise of religion," said the court, "does not guarantee that nothing about religion will be taught in the schools, nor that nothing offensive to any religion will be introduced therein." (Parents had objected to Man, A Course of Study (MACOS) as a part of the school curriculum).[71]

On the other hand, parents have successfully challenged the playing of records of Hair and Alice's Restaurant[72] and Jesus Christ Superstar[73] in public schools where these had nothing to do with the curriculum. In both cases, the courts ruled that the teacher's academic freedom had not been violated, and that the boards had acted in good faith where teachers were dismissed on the grounds that the board believed in good faith that it could get a better teacher for the same money.

Affiliation with a church or religion may not necessarily protect the teacher's job, as illustrated by a case that arose in Colorado.[74] A teacher requested leave to attend a religious celebration. The board denied the request and so notified the teacher. Disregarding the denial, the teacher attended the event and was dismissed for neglect of duty. The Supreme Court of Colorado agreed with the court below that a board of education has a right to expect uninterrupted service from its tenured teachers overturning a conclusion of religious discrimination by the Civil Rights Commission.

When presented in the name of "Art," even religious presentations by students may meet the constitutional test. In New Jersey, the Commissioner of Education held that offering the rock opera "Jesus Christ Superstar" on stage by a group of students passed constitutional muster when offered as a work of dramatic art and music.[75]

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[69] Medeiros v. Kijasaki, 478 P.2d 314 (Hawaii 1970); Cornwell v. State Board of Educ., 314 F. Supp. 340 (Md. 1969), *affirmed*, 428 F.2d 471 (4th Cir. 1969), *cert. den.*, 400 U.S. 942 (1971).

[70] Davis v. Page, 385 F. Supp. 395 (N.H. 1974).

[71] Williams v. Board of Educ. of County of Kanawha, 388 F. Supp. 93 (W. Va. 1975).

[72] Adams v. Campbell County School Dist., 511 F.2d 1242 (Wyo. 1975).

[73] Powers v. Mancos School Dist. RE-6, 391 F. Supp. 322 (Colo. 1975).

[74] School Dist. No. 11 v. Umberfield, 522 P.2d 730 (Colo. 1974).

[75] Jacobs v. Board of Educ. of Town of Phillipsburg, Dec. of N.J. Comm'r of Educ. (1975).

Protests are still being heard concerning the teaching of evolution in public schools but these seem to be on the wane.[76] The ruling here seem to correlate closely with what each community considers acceptable. Courts tend to apply the *Miller v. California*[77] test that allows localities to apply contemporary standards in obscenity and religious matters, although this too is an area of the law where subjective judicial rulings are still being applied in practice.

The *Miller* test replaced a test using nationwide standards in determining the meaning of "obscenity."[78] The test is also in three parts: A work is obscene if 1) the average person, applying contemporary standards, would find that it, taken as a whole, appeals to the prurient interest in sex; 2) it depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and 3) the work, taken as a whole, lacks serious literacy, artistic, political, or scientific value.[79] The Court also retained that part of the *Ginsberg* test that provides for different standards of obscenity for adults and children. Several states have experienced difficulty in drafting a statute to meet this test, and this uncertainty undoubtedly will continue for some time.

In rejecting a national standard in favor of a community-by-community approach, the majority in *Miller* declared that "it is neither realistic nor constitutionally sound to read the First Amendment as requiring that people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas or New York City."[80] Considering that boards tend to represent the dominant religious values of their communities,[81] this local standard scheme places the local board in a stronger position than before in teaching moral and spiritual values in public schools. All that now remains is for local boards to assert their power in the best interests of those values they and their communities feel are of greatest worth to the young.[82]

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[76] Smith v. State, 242 So 2d 692 (Miss. 1970) (statute prohibiting teaching of evolution held unconstitutional); Wright v. Houston Ind. Sch. Dist., 486 F.2d 137 (Tex. 1973) (not unconstitutional where pupils are free to leave the room during presentation); Daniel v. Waters, 515 F.2d 485 (Tenn. 1975) (statute declared unconstitutional that required that any textbook in use in public schools specifically state that the evolution concept is a theory, not a scientific fact).

[77] 413 U.S. 15 (1973).

[78] Ginsberg v. New York, 390 U.S. 629 (1968). *See, in general*, F. Schauer, The Law of Obscenity (Washington: Bureau of National Affairs, 1976) 459 pages.

[79] Schauer, supra at 46-47.

[80] Miller supra at 32.

[81] *See* M. Marty, *The Geography of Religion in America*, Special Report in Britannica Book of the Year 1975 at 592-3. In a majority of U.S. counties, a single church holds the allegiance of over 50 percent of the churchgoing population, according to this report, despite our recognition of the fact that we are a religiously pluralistic nation.

[82] M. Nolte, *Use Your Power or Lose Your Power*, 163 Am. Sch. Bd. J. 16 (Feb. 1976).

SUMMARY

The teaching of moral and spiritual values is predominatly the task of the public schools, with more than ninety percent of American children receiving their schooling this way. These values have become, over time, those values which make for good citizenship in the republic, and relate to the tasks of the citizen: to obey the laws, serve on the jury, serve in the armed forces, pay taxes, vote, and to participate meaningfully in the running of the government.

Although the burden of teaching moral and spiritual values is on the local board, the latter must enlist the cooperation of parents, teachers, administrators, and other groups who have a stake in the outcomes. How this is to be done varies with the community, and depends on the integrity and skill of the board in obtaining cooperation in this joint endeavor. Parents have the greatest stake in this area, and can decide alternatives to public school attendance under certain limited conditions.[83]

CONCLUSIONS

It seems to this writer that our NOLPE organization, now barely twenty-four years old, can play and should play a significant part in clarifying this muddled area of the law. Our constitution does not permit us to take positions on the issues, but we can and should continue to seek the truth where it may be found. That is our greatest strength, our unique mission.

Let us continue to fight for better schools, broadening our influence, acting as a clearinghouse for information on all sides of the issues, and providing that forum without which no progress would be possible. Where people of good will work honestly together to provide better educational opportunity for children, no problem is too great.

For each succeeding generation, the problem of adapting constitutional verities to time and place continues. Let us decide that we shall advance with the same high resolve that Abraham Lincoln felt when he expressed the fervent hope that "this nation, under God, shall have a new birth of freedom—and that government of the people, by the people, for the people—shall not perish from the earth."

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83. Hirschoff, *Parents and the Public School Curriculum: Is There a Right to Have One's Child Excused from Objectionable Instruction?* 50 S. Calif. L. Rev. 871 (July 1977); Schimmel & Fischer, The Rights of Parents in the Education of Their Children Wilde Lake Village Green (Columbia, Md.: National Committee for Citizens in Education, Suite 410, 1977) 162 pages.

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The Bakke Decision: Implications for Employment

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What do we find in the wake of *Bakke*? What impact has the Supreme Court's decision—decisions—had on public education whether in admissions or in employment or in promotions? May we proceed with voluntary affirmative action plans? Voluntary consent decrees? Pressured consent decrees? What kind of pressure? Litigated decrees where there is no finding of past discrimination? Litigated decrees that contain express findings by a government agency or the court? The problem with these questions is that each one produces 10 more. And each of these 10 questions reminds one that the problem does not stand still long enough to permit one to get hold of it.

Before considering these questions, we must go back to *Bakke* and refresh our recollections of that case, its development and the opinions of the court.

Bakke sought admission to the medical school at the University of California at Davis. He was rejected and sued under Title VI of the Civil Rights Act of 1964 on the ground that he was discriminated against and that the University was, therefore, in violation of Title VI because the University had set aside—isolated—16 positions in the entering class. These positions were solely for minority races. Bakke was not a minority; therefore, he was excluded for an unlawful reason: i.e. race, in violation of Title VI.

When the case arrived at the United States Supreme Court, Bakke had been vindicated by the California Supreme Court. That court declared that the University of California could not take race into account *in any form* in its admissions policies.[1]

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[1] Bakke v. Regents of University of California, Cal. Rptr. 680, 553 P.2d 1152 (1976).

The Supreme Court spent 1977 and the first half of 1978 basking in the media blizzard: everywhere one went and every time one read there was a discussion of Bakke—"affirmative action" and "reverse discrimination" became household words—they were legitimate cocktail conversation. From this blizzard emerged, with pristine clarity, six opinions, no clear majority, two identifiable camps: Brennan and Stevens and one opinion in which no one else joined, that is now declared "the law of the land."[2]

Bakke's two major camps chose Justices Brennan and Stevens as their spokespersons. The Brennan camp concluded that the admissions program was fairly designed to correct societal discrimination as determined by the University of California, and that this was authorized under Title VI.[3] It approved Bakke's rejection, therefore, and would have reversed both lower courts under Title VI and the United States Constitution.

The Stevens camp never reached the Constitution. Relying on the principle that the court should not turn to the Constitution where the dispute can be resolved by other means, Mr. Justice Stevens was clear that Title VI prohibits race discrimination; that it is "colorblind"—that is, it does not simply prohibit discrimination against blacks, it prohibits discrimination against any race—that the University of California reservation of 16 places for minorities was patently discriminatory based on race and that Bakke was a victim of that discrimination.

At this juncture, then, four Justices are saying the 14th Amendment permits discrimination in the form of affirmative action to correct the past. Four Justices never reach the Constitution. We do not know what they will say when they get there.

Enter Mr. Justice Powell. He might have been expected to join the Stevens group. He did in result, but not in reasoning. He went to the Constitution itself and concluded that the 14th Amendment does not permit discrimination where race is the sole factor for discrimination: unless—unless there has been a legislative, judicial or administrative determination of prior discrimination. Race was the sole basis on which Bakke was excluded from the University of California; there was no prior discrimination (the Justice felt the University could not make this finding itself). This constituted discrimination in violation of the 14th Amendment.

Of the nine Justices, five reach the Constitution and only one says you may not discriminate on the basis of race alone. Yet his is the opinion which becomes the law of the land—"But for" Powell, the Court could not reach a decision.

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[2] Regents of University of California v. Bakke, 98 S. Ct. 2733 (June 28, 1978).

[3] Title VI of the Civil Rights Act of 1964, § 601 *et seq.*, 42 U.S.C. § 2000d, *et seq.*

It is no wonder the Court was badly split. Indeed, on this issue it is probably good the split is there. The issue is not as clear as some would very persuasively have us believe. There are certain givens which, because of their emotional content, cloud the central individual issue. Who among us can deny that there has been discrimination based on race alone? And the discrimination has been against an entire race, not simply one or two people. And the discrimination has been solely because of skin color. Once one admits these facts, it is relatively easy to jump (*but it is a jump*) to the proposition that those who have been injured should be made whole. This is a concept we can all understand—it is fundamental to our jurisprudence.

Now look around you—no, look again—yes, that man over there, and that woman over there—you make them whole. You do so for all of the good reasons I have suggested—because it is fair. "What," you say, "but I never discriminated—you cannot identify an instance in which I have discriminated on the basis of race." "No, I know you never discriminated, but others before you have and you've been selected."

The problem would be much easier if it were reversed: if one or two—not society as a whole—were guilty of the discrimination and society as a whole were asked to pay the penalty. We understand that concept. We do it in football every day—one man clips and the entire team loses 15 yards. Here, the entire team clipped and one man is asked to lose 15 years—and he doesn't even admit he was on the team. In fact, he says he was in the stands, cheering for the other side.

In the abstract, the notions are sound—but this is not abstract, it's real. It's individual. Repeat, "*individual.*" And when you are the individual, it hurts.

This is why Congress and the courts and the agencies of government go out of their way to encourage voluntary understandings, freely entered into between the parties. This is what Title VII clearly hopes for.[4] It seems to me regardless of their good intentions, they miss the point: the *individuals' rights* that are being affected adversely aren't privy to the "voluntary" understandings that are being encouraged.

This is what happened to one Brian F. Weber. He brought a class action against Kaiser Aluminum and Chemical Corporation as a consequence of an affirmative action program "voluntarily" entered into between Kaiser and its labor unions on a national basis but applying specifically to the Grammercy Plant located a few miles north of New Orleans.[5] The facts are worth reviewing, for the case is currently awaiting a decision by the United States Supreme Court.[6] The impact of *Weber* could be far more significant than *Bakke*, for *Weber* is where the action is. *Weber* involves jobs and money and who gets paid. *Bakke* is simply who gets educated: generally speaking, there is more room to educate than there is to employ. The Justice Department had filed an *amicus* brief asking the court to remand the case for further findings: findings of past discrimination. Weber, the individual who was asked to pay the 15 yard penalty because of the action of his employer and union, established that the affirmative action plan of Kaiser resulted in blacks (with less seniority than Weber and others) being admitted to on-the-job craft training. He alleged this was a violation of Title VII, and the District Court agreed.

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[4] Title VII of the Civil Rights Act of 1964, § 701 *et seq.*, 42 U.S.C. § 2000e, *et seq.*

On appeal to the Fifth Circuit Court of Appeals, the company alleged that its affirmative action plan was mandated by valid executive action, to wit: Executive Order 11246. The Office of Federal Compliance, the agency charged with implementing Executive Order 11246, pressured both Kaiser and the union by threatening to withhold further federal contracts. It was argued that the discrimination against Weber did not violate the Constitution and that the affirmative action was "justified by past societal discrimination even in the *absence* of past employment discrimination" by Kaiser. Note: there was no evidence substantiating past employment discrimination by Kaiser. *The affirmative action program*, then, which established a ratio of one minority to one white until the percentage of minority craft workers roughly represented the ratio of the minority percentage in the area surrounding the plant, *was voluntary*: just what Title VII seeks: voluntary action. It was entered into to avoid future litigation. A square conflict existed between the affirmative action required by Executive Order 11246 and the flat prohibition of Title VII of the Civil Rights Act of 1974. The issue, pure and simple, was whether Title VII of the Civil Rights Act forbids preferential treatment on the basis of race, in the absence of a showing of prior discrimination by the employer. That's easy enough—all you need is a showing of prior discrimination by the employer. But stop. What employer—what school board—what university—in its right mind is going to sign a document admitting prior discrimination in order to support a voluntary affirmative action program. The admission of prior discrimination will, of course, beg lawsuits by those claimed to have been discriminated against. In our football analogy, it is a little like the captain going up to the referee and announcing, "Hey, I clipped that guy. Let's get together and work out a penalty for that fellow over there."

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[5] Weber v. Kaiser Aluminum & Chemical Corp., 415 F. Supp. 761 (E.D. La. 1976), *aff'd*, 563 F.2d 216 (5th Cir. 1977), *petition for cert. filed*, 47 U.S.L.W. 3168 (Sept. 14, 1978).

[6] *Id*. On Monday, December 11, 1978, the Supreme Court *granted Certiorari*. 78 U.S.L.W. 435. On the same date the EEOC issued new guidelines which suggest a rule or reason, apparently to be applied by the employer as the foundation of our predicate for voluntary action. (DLR E-4, 12-11-78).

The philosophy of Title VII pre-supposes prior discrimination before one embarks on a "make whole" or "rightful place" program. This is the philosophy of the Supreme Court in *Franks v. Bowman Transportation Company.*[7] Paraphrased, there must have been a showing of prior discrimination or the minority person involved cannot have been shown to have been deposed from his rightful place. There can be no question that the establishment of quotas in an affirmative action program merely to obtain racial balance of a working force is unlawful without a prior showing of past discriminatory practices. Perhaps an answer is for the legislature or the courts to grant immunity from reverse discrimination suits to employers who sign consent decrees. Plainly, such an answer is easy enough—it simply leaves unprotected the rights of other citizens who did no wrong and who aren't privy to the consent decree.

This problem was spotted by Judge Wisdom in a footnote to his dissenting opinion in *Weber*. He recites:

> The majority opinion leaves in question the status of consent decrees. These decrees, like the one approved by this Court two years ago in *Allegheny-Ludlum*, may be entered without extensive fact-finding by the district court. If consent decrees are immune from the majority's test, friendly suits would offer employers an easy way to circumvent the holding of this opinion. If they are not immune, the district court, before accepting the consent decree, will be forced to determine the existence and extent of past discrimination by the defendants.[8]

Where does this fit, in the context of public school employment? Four or five years ago, the Justice Department, in an excess of zeal, began filing pattern and practice cases under Title VII against school districts in various parts of the country. Invariably, they would sweep in, generally accompanied by an appropriate show of FBI agents, prepare their case, and demand the execution of a consent decree setting forth quotas, euphemistically entitled goals and timetables. Always the attorney on the case was young, always he or she was a different person—so there was no continuity. In some cases, to save money, consent decrees were signed. In a number of cases the jurisdiction of the Justice Department to bring such an action was successfully challenged. Sensing a need to have regulations supporting its rights to bring such actions, the Justice Department succeeded in having the regulations amended to that effect this summer. It now has authority to bring pattern and practice actions against boards of education. It will come as no surprise to some, of course, that the school districts which successfully challenged the Justice Department's lack of jurisdiction over the past several years are now receiving requests for information. At least one question which must cross the mind of the school districts that spent thousands of dollars to establish the absence of jurisdiction is whether they should have signed the consent decrees. In fact, would it be more prudent for them to enter into consent decrees now?

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[7] 424 U.S. 747 (1976).

[8] 563 F.2d at 229 n.6 (dissenting opinion of Judge Wisdom).

The language of the consent decree of one of the districts which signed will help us to focus on the problem:

> The defendants have denied the allegations contained in the complaint filed by the United States and this decree shall not be construed as an admission by the defendants of violations of Title VII of the Civil Rights Act of 1964 and of the 14th Amendment to the Constitution of the United States, or as a finding of such violation.[9]

Not only is there no finding of prior discrimination, there is an express denial. How do you justify favoring one group over another because of race?

In a memorandum opinion handed down in February, 1978, the District Court for Eastern Michigan[10] found Title VII violated where a voluntary affirmative action program resulted in white male police officers being intentionally passed over for promotion to rank of sergeant, solely because of their race.

As in any Title VII action, the plaintiffs had to carry the initial burden under the statute of establishing a prima facie case. Both the language and history of Title VII made it clear that its protection applies to whites as well as blacks.[11] This was not a hiring case, it was a promotion case. Therefore, plaintiffs had to establish: (1) they belonged to a protected class; (2) they were qualified for promotion and might have reasonably expected selection for promotions under the defendant's on-going competitive promotion system; (3) they were not promoted; (4) the supervisory level employees having responsibility to exercise judgment under the promotion system betrayed in other matters a predisposition towards discrimination against the members of the protected group. The court found each of these elements had been proved and declared: "finally, defendants' operation of the affirmative action plan evinced a predisposition towards discrimination against whites."[12]

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[9] United States v. Board of Educ. of the Euclid Pub. Sch. Dist., C-75-56 (N.D. Ohio 1976). A similar action containing virtually identical allegations was filed against a neighboring school district. United States of America v. Board of Educ. of the Garfield Heights City Sch. Dist., C-75-689 (N.D. Ohio). The Board challenged the jurisdiction of the Justice Department to bring pattern and practice actions. The challenge was upheld in the District Court and was *affirmed on appeal*, United States v. Board of Educ. of the Garfield Heights City Sch. Dist., 435 F. Supp. 949 (N.D. Ohio, 1976), *aff'd*, 581 F.2d 791 (6th Cir. 1976).

[10] Detroit Police Officers Ass'n v. Young, 446 F. Supp. 979 (E.D. Mich. Feb. 27, 1978).

Paradoxically, the court thought little of the statistics offered by the employer to justify its discrimination. These were the statistics that led it to believe the affirmative action program was necessary. Said the court:

> Whether or not an *employer*, in adoption of a so called "affirmative action" plan, can rely solely upon statistical comparisons in an effort to prove prior discrimination in its employment practices appears to be highly questionable since the logic for allowance of such statistics would not apply. If an employer has discriminated against a group, intentionally or otherwise, the employer is the party in the best position to be able to produce concrete evidence of its prior discrimination. Normally, if an employee produces evidence of a statistical disparity, the burden of explanation would shift to the employer. However, to require an employee who charges the employer with discrimination against him, to refute the employer's reliance on statistical comparisons is an onerous burden which should not befall the employee. He is not in control of the evidence, and has, as the discovery process in this case reveals, no reasonable means of gaining access to the alleged evidence.[13]

Note the burden being imposed: if you wish to defend yourself in this lawsuit, you must "produce concrete evidence of prior discrimination." "Mr. Referee, I know you don't believe me, but by God, my team clipped that guy, and here, my wife took a picture showing my team doing the clipping."

The court's conclusion was clear:

> In the absence of proof of prior discrimination as claimed by

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[11] McDonald v. Santa Fe Transportation Co., 427 U.S. 273 (1976).

[12] 446 F. Supp. at 1003.

[13] *Id.* at 1005 (emphasis original).

> the defendants the preferential promotion plan of the defendants clearly violates Title VII as an impermissible *racial quota*. 42 USC 2000e-2(a),(j). This conclusion would persist even if the instant plan had been judicially mandated since as a precondition to quota type relief under the Act prior unlawful discrimination must be found to exist.[14]

Even if there is proof of prior discrimination, Title VII "*does not grant the employer, acting alone, the prerogative of fashioning quota type relief*," and a judicially mandated "consent decree" without express court findings will afford you no protection. There are those who argue that the Supreme Court has tacitly approved consent decrees because it denied certiorari in *EEOC v. American Telephone & Telegraph Co.*,[15] That case did involve a consent decree with no express finding of prior discrimination. I am not persuaded. Among other reasons the consent decree was to expire in January, 1979, and the issue would have been moot before the court could have considered it.

> To be sure voluntary compliance in eliminating unfair labor practices is the central theme of Title VII and is preferable to court action. *Franks v. Bowman Transportation Co.*, 424 US 747 (1976). However, *installation of remedies* designed to correct past unfair labor practices which discriminate against certain racial groups is a far cry from the equitable relief intended by Section 806(g). While Congress recognized that remedies must be fashioned to correct prior discriminatory practices and to cure the ill effects of past discrimination, it was cognizant of the fact *that courts alone* are in a position to *afford due process* to all concerned in determining the necessity for and in fashioning such relief.[16]

In summary, "quotas" may be fashioned by courts to remedy past discrimination—but not by employers.

What, then, is a quota? "Seems to me as though I've heard that song before."

Let us return to the consent decree the Justice Department persuaded school districts to sign just three years ago—under the euphemistic title: "Goal and Timetables." We find:

> 1. The Board of Education shall establish an ultimate goal of increasing the employment of qualified blacks as full-time teachers and administrators in the district to such an extent that blacks shall comprise approximately 15 percent of the

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[14] *Id.* at 1009 (emphasis supplied).

[15] 556 F.2d 167 (3d Cir. 1977), *cert. denied*, July 3, 1978, 47 L.Ed.2d (1978).

[16] *Id.* at 1010 (emphasis supplied).

> teaching force in the district, which is approximately the percentage of available black faculty and staff in the employment area of Cuyahoga County. Subject to the availability of qualified applicants, at least 25 percent of the new teachers hired by the Board of Education for each school year shall be black until such time that the ultimate goal is achieved.
>
> 2. The establishment of an ultimate goal shall never require the Board of Education to hire a person who does not have the qualifications needed to perform the job successfully; nor shall the Board of Education be required to hire a less qualified person in preference to a better qualified person, provided that the qualifications (standards) used to make such relative judgments reasonably measure the person's ability to do the job in question. The terms "less qualified" and "better qualified" as used in this consent decree are not . . . equally well qualified in terms of being able to perform the job successfully. *Unlike quotas, therefore, which may call for a preference for the unqualified over the qualified,*[17] to meet the numerical requirement, the goal herein established recognizes that persons are to be judged on individual ability and therefore is consistent with the principles of merit hiring.[18]

Tell me please: if one strips away the sugar coating, is it not clear that "goals and timetables" are in fact numbers, are in fact quotas? This was precisely the conclusion of Laurence H. Silberman, former Undersecretary of Labor from 1970 to 1973. In an article appearing in the "Wall Street Journal:"

> . . . While serving in the Labor Department, I helped devise minority employment goals for government contractors.
>
> I now realize that the distinction we saw between goals and timetables on the one hand, and unconstitutional quotas on the other, was not valid. Our use of numerical standards in pursuit of equal opportunity has led ineluctably to the very quotas guaranteeing equal results, that we initially wished to avoid.

Quoting further from Mr. Silberman in the context of education—and *focusing on the problem:*

> However, when HEW, following Labor Department policy, required goals and timetables for University faculty hiring, the intellectuals reacted sharply. I remember my own special shock when three deans came to complain about HEW's decree

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[17] Note that the Justice Department is inferentially saying that a *quota* calls for "unqualified".

[18] United States v. Board of Education of the Euclid Public School District, *supra* note 9 (emphasis supplied).

> that in meeting its goals a university department would not hold minorities to a standard higher than the least qualified faculty member. I asked whether I could identify, for example, the least qualified member of the economics faculty at Harvard. (I could, although admittedly based more on philosophic preference than objective standards.)

But if "quotas," regardless of what they are called, cannot be agreed to or established voluntarily by employers, don't we destroy the thrust of Title VII's voluntary compliance theme? Not according to the District Court for the Eastern District of Michigan:

> The reasoning that unless an employer can fashion quota type relief the voluntary compliance theme of Title VII will be subverted is partially naive. Voluntary quota relief by an employer, as this case evidences, merely changes the racial makeup of the plaintiff class. Accordingly, the Court holds, as a matter of law, that *quota relief, when fashioned by the employer without the assistance and direction of the court, is not permited and runs afoul of Section 706(g) of Title VII.*[19]

Nor is the Eastern District of Michigan alone.

The Federal District Court for the Eastern District of Louisiana, in *United States v. City of Alexandria,*[20] declined to sign a proposed consent decree which would establish a quota system for the hiring of qualified blacks and females as firefighters, where there was no finding of past job bias against minorities or women. The court was not assured that the terms of the decree would be lawful or equitable, absent a finding of past bias. And again the same result had been reached in *Cramer v. Commonwealth of Virginia,* U.S. District Court for the Eastern District of Virginia, 1976.[21] That case involved a male who sought the protection of the 14th Amendment and Title VII because he was not promoted when two less-qualified females were promoted. The University justified its affirmative action "goals and quotas" on the basis of expressed state and national policy—that the effects of past discrimination be cured. Said the court:

> However, even assuming an "imbalance" such as that contemplated by subsection (j) which would trigger the affirmative action imperative that sex be given paramount consideration to correct the imbalance, subsection (j) is the clear

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[19] Detroit Police Officers Association v. Young, *supra* note 10 at 1010.

[20] United States v. City of Alexandria, 16 EPD ¶ 8344 (E.D.La. 1977).

[21] Cramer v. Virginia Commonwealth University, 415 F. Supp. 673 (E.D.Va. 1976), *vacated and remanded without opinion,* 580 F.2d 1047 (4th Cir. Aug. 15, 1978).

> sense of Congress that it not be corrected by sex preference, or quotas, or, to use the current pseudonym, "goals."

And the beat goes on. In *Jurgens v. Norton*,[22] a valid class action was found against the Equal Employment Opportunity Commission because the "model" affirmative action plan voluntarily entered into by the Commission lacked any prior finding of discrimination.

Let's go back to *Bakke.* In Mr. Justice Powell's opinion he confronts the argument of the University that its quota admissions plan should not be subjected to "strict scrutiny" because the court had in the past approved "preferential classifications." Mr. Justice Powell considered the preferences in school class and sex gender cases and then turned to the employment cases where preferential treatment had been approved. He found them not to support the University's position because in each case, the discrimination was shown to have been committed by the employer, not society at large.

> The courts of appeals have fashioned various types of racial preferences as remedies for constitutional or statutory violations resulting in *identified*, racial-based injuries to *individuals* held entitled to the preference. . . . Such preferences have also been upheld where a *legislative or administrative body charged with the responsibility made determinations of past discrimination* by the industries affected and fashioned remedies deemed appropriate to rectify the discrimination. . . . But we have never approved preferential classifications *in the absence of proven constitutional or statutory violations.*[23]

It is important to note the court's language—the injuries were specifically "*identified*." They were to "*individuals*" who got the preference. And they occurred where legislative or administrative bodies had made determinations of past discrimination. Does this mean a determination by the Justice Department in the person of ever changing lawyers is sufficient predicate for a consent decree? Mr. Justice Powell seems to say so in footnote 41:

> This case does not call into question congressionally authorized administrative actions, such as consent decrees under Title VII. . . . In such cases, there has been detailed legislative consideration of the various indicia of previous constitutional or statutory violations, . . . and particular administrative bodies have been charged with monitoring various activities in order to detect such violations and formulate appropriate remedies.[24]

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[22] Jurgens v. Norton, 17 EPD ¶ 8410 (N.D. Tex., May 22, 1978).

[23] Regents of University of California v. Bakke, 98 S. Ct. 2733, 2754-55 (June 28, 1978) emphasis supplied.

[24] *Id.* at 2755 n.41.

One day after *Bakke*, the Supreme Court handed down *Furnco Construction Corp. v. Waters.*[25] Three blacks brought an employment discrimination suit under Title VII. Mr. Justice Rehnquist, joined by all but Justices Marshall and Brennan, was clear that Title VII does not impose a burden on employers to maximize the hiring of minority employees. "Title VII forbids him [the employer] from having as a *goal* a work force selected by any proscribed discriminatory practice, but it does not impose a duty to adopt a hiring procedure that maximizes the hiring of minority employees."[26]

If *race* is a proscribed basis for discrimination, it may not be used as the basis for selecting to reach a goal!

In short, Mr. Justice Powell's footnote 41 is weakened by the *Furnco* opinion in which seven justices concurred. Why? Because all agreed with the Seventh Circuit that a *prima facie* case had been established: there was illegal discrimination unless the employer could explain his actions. If seven Supreme Court justices, a federal court of appeals and a district court agree on a *prima facie* case, is this more or less than a series of Justice Department lawyers making such determination? When that happens, can the school board or university employer sit silently and sign a consent decree that relies on race to establish goals: Should the employer offer his explanation (a la *Furnco*)? If he does, should this be recorded in the consent decree? If it is, doesn't this mean there has been no legally recognized discrimination? And, therefore, no predicate for goals and timetables or quotas? If he does not, isn't the employer laying himself open to a "reverse discrimination" charge?

How about those of us in this room who have laboriously prepared, with the best of intentions, thoughtful, fair and decent affirmative action-goal and timetable plans. What do we do? If we honor them, we risk reverse discrimination suits. If we do not, we risk specific performance actions or discrimination suits. For me, the plans which are on the books are there and should be followed—perhaps with less fanfare—but nevertheless followed unless you have a clear quota—or a known challenger ready to fight.

In that case, and certainly in future consent decrees, I would take a lesson from Harvard.[27] Whatever my affirmative action plan, it would be generously laced with phrases indicating the desirability of a balanced faculty, and race would be one of many factors I would take into account along with background, academic record and geographical origin, to list a few.

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[25] 98 S. Ct. 2943 (June 29, 1978).

[26] 98 S. Ct. at 2950 (emphasis supplied).

[27] *See* Regents of University of California v. Bakke, 98 S. Ct. at 2764-66.

I would avoid goals and timetables and quotas or whatever title one selects. They are *pretty* language which I suggest won't add much to a *plan*; if I had something I called a goal, it would not be to improve "*racial balance*," it would be to let my school or university present its students with a wide variety of teachers. I would concentrate on language and tactics describing an approach to improve the availability pool of those I felt were needed as part of the work force—the language would underscore efforts at advertising, visiting colleges, encouraging minorities—and if all of this did not satisfy the Justice Department, I'd return to my football game. My team did the clipping: I told the referee—the referee told me he'd decide who clipped and who would pay the penalty. Everything else had failed: "punt."

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The Bakke Decision: Implications for Admissions

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On June 28, 1978, nine Justices of the Supreme Court of the United States handed down six opinions in the *Bakke*[1] case. No one opinion commanded a majority vote of five Justices. The collective result of the six opinions was to give something to everyone at the expense of clarity, candor and decisiveness. The only thing that is currently beyond dispute is that Allan Bakke was assured admission to the Medical School of the University of California at Davis. The rest is subject to argument, conjecture and speculation. Thus, the *Bakke* case is a rough and unsure guide to the future.

To understand the Supreme Court's treatment of the issues in *Bakke* it is necessary, once again, to state the undisputed facts.

FACTS

The Medical School at Davis opened in 1968, and shortly thereafter, the faculty created a separate and distinct admissions program for "disadvantaged" applicants. In its Regular Admissions Program, applicants were subjected to several rigorous screens. First, regular applicants having less than a 2.5 undergraduate grade point were summarily rejected. Second, the remaining applicants wre systematically compared on their admission credentials—primarily test scores and grade point averages—and many were excluded. The remaining applicants were interviewed and then assigned a "benchmark" score embracing "the interviewers' summaries, the candidates' overall grade point average, grade point average in science courses, and scores on the

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[1] Regents of University of California v. Bakke, 98 S. Ct. 2733 (1978). Hereinafter cited as "Bakke", or when referring to a specific opinion as "Bakke-Powell".

Medical College Admissions Test (MCAT), letter of recommendation, extracurricular activities and other biographical data."[2]

Davis's Special Admissions Program operated differently. It used a separate committee, a majority of the members of which were members of minority groups. The Chairman screened the special applicants to identify which of them were eligible for special consideration by looking, "among other things,"[3] to see whether "the applicant had been granted a waiver of the school's application fee, which required a means test; whether the applicant had worked during college or interrupted his education to support himself or his family; and whether the applicant was a member of a minority group."[4] The minority group classification included only Blacks, Chicanos, Asians, and American Indians. The "special candidates did not have to meet the 2.5 grade point average cut-off applied to regular applicants."[5] The Special Committee identified its top choices and presented them to the Regular Admissions Committee which "did not rate or compare the special candidates against the general applicants . . . The Special Committee continued to recommend special applicants until a number prescribed by faculty vote were admitted. While the overall class size was still 50, the prescribed number was eight; in 1973 and 1974, when the class size had doubled to 100, the prescribed number of special admissions also doubled, to 16."[6]

Although "disadvantaged whites applied to the special program in large numbers, . . . none received an offer of admission through that process."[7] But, on the other hand, some members of the minority groups who were specially preferred were admitted through the regular admissions process. Thus, the favored minority group applicants competed for all of the 100 first-year Medical School seats—the 16 reserved for the Special Admission Program plus the remaining 84 seats. But, non-minority applicants, who were subject to the Regular Admission Process, were able to compete only for the remaining 84 places which were open to them for competition. Finally, "for the 1974 entering class, 3,737 applications were submitted,"[8] making the competition ratio more than 37 applications for each place in the total entering Medical School class of 100, and stricter for the non-minority applicants.

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[2] *Id.* at 2740.
[3] *Id.* at 2740, note 4.
[4] *Id.*
[5] *Id.* at 2740.
[6] *Id.* at 2741.
[7] *Id.*
[8] *Id.* at 2740, note 2.

Allan Bakke, a white male, applied to Davis's Medical School in 1973 and 1974. He was rejected each time. In each year he went through the Regular Admission Process and received an interview. "In both years, applicants were admitted under the special admissions program with grade point averages, MCAT scores, and benchmark scores significantly lower than Bakke's."[9]

It can be seen that Davis's Admissions Program resulted in two separate and distinct kinds of exclusion. The first type of exclusion concerned applicants like Bakke who were excluded from competing for the entire 100 available places. These non-minority applicants were limited to competing for 84 places. But minority applicants, eligible for the Special Admissions Program, were able to compete for the entire 100 available places. The second kind of exclusion concerned applicants like Bakke. They had superior overall credentials qualifying them for the study of medicine. But, they were excluded from Medical School because of the existence of the Special Admissions Program which awarded preferential admission to minority group members who had qualifications significantly lower than Bakke's. In both types of exclusion the allocation of social goods is directly involved, and that allocation was partially made by Davis's Medical School on the basis of race.

After his second rejection *Bakke* brought suit raising two basic issues of federal law which were addressed by the Justices of the Supreme Court of the United States. Bakke argued that Davis's Special Admission Program was illegal under Title VI and that he had been denied admission illegally. Title VI provides:[10]

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance.

There was no doubt that Davis's Medical School received federal financial assistance.

The second basic issue raised by *Bakke* involved his claim of unconstitutional unequal treatment under the equal protection clause of the fourteenth amendment which provides:[11]

> [N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws.

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[9] *Id.* at 2741-42.

[10] 42 U.S.C. § 2000d.

[11] U.S. Const., amend. XIV.

There was no doubt that Davis's Medical School came within the fourteenth amendment because of its exercise of state power.

There was no doubt of Bakke's direct exclusion because of Davis's Special Admissions Program. California's trial court placed the burden on Bakke to show that his exclusion from Medical School was due to Davis's Special Admissions Program. That "court refused to order Bakke's admission . . . holding that he had failed to carry his burden of proving that he would have been admitted but for the existence of the special program."[12] The Supreme Court of California reversed on this point placing the burden on the University and remanded the case to the trial court "for the purpose of determining whether, under the newly allocated burden of proof, Bakke would have been admitted . . . in the absence of the special admission program."[13] But, in its petition for rehearing, the University admitted to California's Supreme Court that it could not carry the burden of showing that Bakke would not have been admitted in the absence of Davis's Special Admissions Program. In light of this admission, "the California Court thereupon amended its opinion to direct . . . Bakke's admission to the medical school."[14] Proceedings followed in the Supreme Court of the United States.

THE *BAKKE* OPINIONS

There are three principal opinions in the *Bakke* case: one by Mr. Justice Stevens for himself and joined by Mr. Justices Stewart and Rehnquist and Chief Justice Warren Burger; a second opinion by Mr. Justice Powell, solely for himself, and a third opinion by Mr. Justice Brennan for himself and Mr. Justices White, Marshall and Blackmun—each of the latter three also wrote separate opinions. Thus, the vote amounted to a 4-1-4 split, and there was no clear majority vote in support of any one rationale. *Bakke* is an unstable precedent.

The Stevens Group

The four Justices led by Mr. Justice Stevens restricted themselves to deciding only one question which they believed was controlled by Title VI. That question was whether the judgment of California's Supreme Court ordering that Bakke be admitted to Davis's Medical School should be affirmed or reversed. This question required this group to pass on the legality of Davis's program, but only on the legality of that one program. There was no other part of the judgment of California's

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[12] Bakke-Powell at 2742.

[13] *Id.* at 2743.

[14] *Id.* at 2743-44.

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Supreme Court before the U.S. Supreme Court for review, and the Court "reviews judgments, not statements in opinions."[15] Thus, Justice Stevens, for his group of four, insisted that it was inappropriate for Justice Powell to consider any other question involving the use of race in any other special admissions plan except for the use of race in Davis's Special Admissions Program. Justice Stevens emphasized that "it is therefore perfectly clear that the question whether race can ever be used as a factor in an admissions decision [in some other conceivable program] is not an issue in this case, and that discussion of that issue is inappropriate."[16]

Limiting himself solely to the question of Bakke's admission, and focusing on the second type of exclusion noted above, i.e., the exclusion of Bakke from Medical School education because of the existence of Davis's preferential program based on race, Mr. Justice Stevens confined himself to Title VI. This group of four Justices did not address any constitutional issue nor the validity of other possible uses of race in any other admissions program other than Davis's.

After quoting Title VI, Mr. Justice Stevens set forth the basic conclusion of his group:[17]

> The University, through its special admissions policy, excluded Bakke from participation in its program of medical education because of his race. The University also acknowledges that it was, and still is, receiving federal financial assistance. The plain language of the statute therefore requires affirmance of the judgment below. A different result cannot be justified unless that language misstates the actual intent of the Congress that enacted the statute or the statute is not enforceable in a private action. Neither conclusion is warranted.

Thus, for Mr. Justice Stevens's group of four, Bakke's case was easy. Congress had incorporated the antidiscrimination principle in Title VI and "the meaning of the Title VI ban on exclusion is crystal clear: Race cannot be the basis of excluding anyone from participation in a federally funded program."[18] Bakke had been excluded from participating in a federal funded program on the grounds of race. Therefore, this group of four Justices believed it was their "duty to affirm the judgment ordering Bakke admitted to the University."[19]

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[15] Black v. Cutter Labs., 351 U.S. 292, 297 (19—).

[16] Bakke-Stevens at 2810.

[17] *Id.* at 2811.

[18] *Id.* at 2813-14.

[19] *Id.* at 2815.

This opinion discloses the particular feature of the Davis plan that rendered it illegal. That feature is the use of race in a situation such that because of that use of race someone is excluded from enjoying the social good of publicly financed medical education.

It should be noted that there are many types of racially-conditioned programs to which this opinion would not apply because these programs are not exclusionary. One good example is a voluntary plan of school desegregation. So long as no student is excluded from public education because of a desegregation program there would be no violation. A second type of valid program would be one where race is used in an affirmative action program designed to increase the pool of candidates competing for a job or for admission to a federally financed program. This second type of program would not come within Justice Stevens's opinion so long as race is used only to increase the candidate pool but not used at the later stage when actually making the selection decision, thereby excluding some person on racial grounds. Thus, Mr. Justice Stevens's opinion does not preclude all uses of race under all circumstances; however, it does preclude the use of race in a program where that use of race excludes someone from participating in a federally funded program.

Unfortunately, Mr. Justice Stevens's opinion does not speak to the scope of coverage of Title VI. That Title is directed to programs or activities receiving federal financial assistance. The statute provides for the termination of federal funding to any recipient not in compliance with its terms, "but such termination or refusal shall be limited to the particular political entity, or part thereof, or recipient as to whom such a finding has been made and, shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found."[20] Thus, it is quite possible that in some future case the U.S. Supreme Court will rule that Title VI is program specific; that is, its application is limited to the specific program receiving federal funds. The few decided cases have used language suggestive of this direction.[21] Nevertheless, it must also be remembered that the receipt of federal funds for one program may have significant indirect financial benefits for other programs or components. If this line of analysis is followed by the Court, then Title VI would apply to all programs directly and indirectly receiving federal financial benefits.

Additional uncertainties surround Title VI. A critical one is whether the statute is subject to private enforcement in the courts. In the past the Supreme Court has assumed that it was.[22] *Bakke* leaves that question still open. Mr. Justice Stevens's group of four Justices were strongly of the view that Title VI generally was subject to private enforcement, but they actually ruled more narrowly. They ruled only that the University would not be allowed to dispute Bakke's private enforcement of Title VI at this late date because the University raised its objection to private enforcement for the first time in the United States Supreme Court. Mr. Justice Powell and Mr. Justice Brennan plus two of the remaining three Justices in Brennan's group held that the question of private enforcement was immaterial to the case. Mr. Justice White, the final member of Mr. Justice Brennan's group, wrote a separate opinion in which he denied that Title VI conferred a private right of action.

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[20] 42 U.S.C. § 2000d-1.

[21] Board of Pub. Inst. v. Finch, 414 F.2d 1068 (5th Cir. 1969).

In summary of the Stevens opinion, which commanded four votes, it can be said that (1) the opinion is limited to ruling on whether California's Supreme Court judgment ordering Bakke's admission is correct because that is the only issue believed to be before the Court; (2) it expressly states that "the question whether race can ever be used as a factor in an admission decision is not an issue in this case, and that discussion of that issue is inappropriate"; (3) it is further limited to interpreting and applying Title VI; (4) it interprets that statute in accordance with the "plain meaning" rule; (5) its interpretation is that Title VI's plain meaning prohibits the exclusion of any person on grounds of race from participating in any program or activity receiving federal funds; (6) it characterized Davis's Special Admissions Program as one that excluded some persons; i.e., Bakke, on grounds of race; (7) it held Davis's Special Admissions Program illegal because it violated Title VI; (8) it affirmed the California Supreme Court judgment ordering Bakke to be admitted to Davis's Medical School; (9) it indicated that Title VI is privately enforceable but actually ruled only that its private enforcement could not be challanged in this case for the first time in the U.S. Supreme Court; and (10) it expressly refused to reach the constitutional issues.

The Powell Opinion

Mr. Justice Powell cast the fifth vote affirming the California Supreme Court judgment ordering that Bakke be admitted. In an opinion that no other Justice joined, Mr. Justice Powell also ruled that Davis's Special Admissions Program was unconstitutional, thereby adding the fifth vote against that program's validity. Thus, Davis's specific program is not permissible, but there is no unifying rationale because Mr. Justice Powell found it defective on constitutional grounds while Mr. Justice Stevens's group of four found it illegal on the statutory grounds of Title VI.

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[22] Lau v. Nichols, 414 U.S. 563 (1974).
[23] Bakke-Stevens at 2810.

Contrary to Mr. Justice Stevens's group which restricted its opinion to one basic issue, Mr. Justice Powell addressed two basic issues: (1) whether the California Supreme Court judgment ordering Bakke's admission should be affirmed; i.e., Did Davis's Special Admissions Program unjustifiably harm Bakke, and (2) whether "the [California Supreme] court's judgment enjoining [Davis] from according any consideration to race in its admission process must be reversed."[24] I shall consider the issues in order beginning with whether the California Supreme Court's judgment ordering Bakke's admission should be affirmed.

Mr. Justice Powell ignored Mr. Justice Stevens's "plain meaning" approach of statutory interpretation and the plain meaning of Title VI. He ruled that the question of private enforcement was not before the Court and then he interpreted Title VI in light of what he conceived to be its purpose: "the voluminous legislative history of Title VI reveals a congressional intent to halt federal funding of entitites that violate a prohibition of racial discrimination similar to that of the Constitution."[25] It should be noted that the Constitution is not colorblind and it does not prohibit all uses of racial classifications.[26] Justice Powell concluded that in "view of the clear legislative intent, Title VI must be held to proscribe only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment."[27] In short, Justice Powell interpreted Title VI as applying only to those uses of racial classifications which are prohibited by the Constitution.

This line of statutory analysis, which was also adopted by Mr. Justice Brennan's group of four Justices, leads to a bizarre conclusion. It requires that in novel cases such as Bakke's, before the courts can identify whether a racial classification falls within or without the coverage of Title VI, the Courts first must decide a constitutional question. They must decide whether a new use of a racial classification would violate the Constitution. If the answer is "yes", then Title VI applies. Thus, courts must decide the statutory question of coverage, and presumably, courts must do so, even though no constitutional question has been raised by the parties. This technique of interpreting Title VI runs smack into the face of two deeply entrenched doctrines: (1) courts should not decide constitutional questions unless they absolutely must[28], and (2) if a case can be disposed of on statutory or some other grounds rather than on constitutional grounds, then courts must rule on the statutory or other grounds first.[29] Enough has been said to show that the Powell-Brennan approach to interpreting Title VI is defective and must be jettisoned.

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[24] Bakke-Powell at 2739.

[25] *Id.* at 2745.

[26] *See, e.g.*, United Jewish Org. v. Carey, 430 U.S. 144 (1977).

[27] Bakke-Powell at 2747.

The Powell-Brennan interpretation of Title VI carries an important implication. It is that Title VI must necessarily be violated whenever the Fourteenth Amendment's equal protection clause is violated. Thus, in *Bakke*, Justice Powell is driven to the conclusion that Davis's Special Admissions Program violated Title VI because he held the program violated the Fourteenth Amendment as well. But, Justice Brennan is not driven to the same conclusion because his constitutional analysis produced the view that Davis's Program did not violate the Fourteenth Amendment; thus, Davis's Program would not violate Title VI. It seems, therefore, that the Powell-Brennan technique for interpreting Title VI will fail to produce consistently agreed-upon conclusions about the meaning of Title VI, and, indeed, will tend to spawn a diversity of meanings.

All nine Justices declared themselves on the meaning of the prohibition found in Title VI. Nevertheless, after the Bakke decision the proper meaning of that Title's prohibition remains quite clouded. Part of the cloudiness comes from the disagreement between the Stevens group of four and the Powell-Brennan group of five over the correct approach to the statutue's interpretation. The Stevens group declared itself for the "plain meaning" approach unless otherwise required by the statute's legislative intent. The Stevens group ultimately held that Title VI's mandate is a "color-blind" requirement and that *Bakke's* exclusionary type of affirmative action program violated the Title's prohibition. The Powell-Brennan group of five ignored Stevens's "plain meaning" approach to statutory interpretation and declared themselves for the "purpose" approach to statutory interpretation, holding that Title VI did not mandate a color-blind approach to *Bakke's* type of affirmative action program and that Title VI would prohibit such a program if and only if the Fourteenth Amendment would also prohibit the program.

But, at this point *Bakke* produces more murkiness about Title VI's meaning because of a disagreement within the Powell-Brennan group of five. Mr. Justice Powell held that California's Supreme Court properly ordered Bakke's admission, that Davis's Special Admissions Program violated the Fourteenth Amendment, and therefore, he must also hold that it violates Title VI as well. Thus, Justice Powell must agree with the Stevens group of four, thereby producing a majority of five, that Davis's Program violated Title VI, although he would disagree with them on the proper approach to interpreting the statute. On the other hand, Mr. Justice Brennan's group of four disagreed with Mr. Justice Powell's constitutional analysis and believed that Davis's Special Admissions Program was not unconstitutional.

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[28] *E.g.*, Courts should not "anticipate a question of constitutional law in advance of the necessity of deciding it." Steamship Co. v. Emigration Commissioners, 113 U.S. 33, 39 (19—).

[29] *E.g.*, Siler v. Louisville & Nashville R.R., 213 U.S. 175, 191 (19—).

All of this is further clouded by the fact that Mr. Justice Powell expressly ruled against Davis's Program on constitutional grounds and said nothing about it also violating Title VI.

In summary, Justice Stevens's group of four held that Title VI prohibited Davis's Program on a "color-blind" interpretation, but Justice Brennan's group of four held Title VI did not prohibit Davis's program on a "color-conscience-if-constitutionally-permissible" theory of interpretation. Mr. Justice Powell cast a fifth vote accepting the "color-conscience-if-constitutionally-permissible" theory of Title VI interpretation, but he also cast a fifth vote against the validity of Davis's program because he believed the Fourteenth Amendment (and therefore Title VI) would not permit it.

The five votes that actually were dispositive of the issue (whether California's Supreme Court judgment ordering Bakke's admission should be upheld or reversed) were cast by Justice Powell and Justice Stevens's group. They did not agree on a proper approach or content for Title VI, ultimately disagreeing on whether Title VI is color-blind or allows color consciousness. Thus, the dispositive majority vote on this issue lacks a unifying rationale and rests upon significantly differing approaches to Title VI's interpretation and content. Mr. Justice Brennan's group cast four votes against this result, which, obviously, did not dispose of the issue. In strict, but accurate, analysis therefore, the Brennan group's four votes cannot be aggregated with Mr. Justice Powell's vote to yield a majority of five votes to the effect that Title VI may permit color conscious affirmative-action programs. The reason is that the votes of Justice Brennan's group of four did nothing to dispose of the issue whether the California Supreme Court judgment should be affirmed or reversed. In short, those four votes control and dispose of nothing on that issue. Thus, I conclude that with respect to this issue only[30], *Bakke* does not settle whether Title VI is color-blind or may permit color-conscious affirmative-action programs. That question remains open.[31]

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[30] I discuss later whether there is a second issue in the *Bakke* case.

We must analyze Justice Powell's constitutional views in order to identify the precise elements removed from university admissions programs by the *Bakke* decision. The reason is that Justice Powell's vote along with the Stevens group of four provided the five-vote majority holding that Bakke should be admitted and against Davis's Special Admissions Program. It will be recalled that the particular feature of Davis's Program rendering it contrary to Title VI for the Stevens group was the Program's use of race in a situation of limited enrollment (100 places) with the necessary consequence that someone (Bakke) was excluded from a federally financed activity on racial grounds. Every time a person was admitted on racial grounds to one of Davis's 100 places, someone else was excluded on racial grounds from being admitted to one of the 100 places. Mr. Justice Powell based his views on an exclusion, but it was a different kind of exclusion that he found inherent in Davis's Program. He essentially concluded that Davis's Program violated the Fourteenth Amendment because it excluded non-minorities from competing in common with minorities for all 100 entering places for the first-year of medical school. Minority applicants could compete for the full one hundred seats (16 reserved for the special admittees plus the remaining 84) but non-minority applicants were prohibited on racial grounds from competing for the sixteen special places, leaving them only 84 places to compete for. This, Justice Powell believed, was a denial of the equal protection of the laws.

Considering the exclusion from competition inherent in Davis's Program Justice Powell first considered the difference between a goal and a quota, saying that "this semantic distinction is beside the point" and that "to the extent that there existed a pool of at least minimally qualified minority applicants to fill the 16 special admission seats, white applicants could compete for only 84 seats in the entering class, rather than the 100 open to minority applicants. Whether this limitation is described as a quota or a goal, it is a line drawn on the basis of race and ethnic status."[32]

Justice Powell concluded that although the "rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual,"[33] and although an individual generally has a right to be free from being handled by the State on racial grounds, all uses of race classifications by a state university are not *per se* unconstitutional. Some racial classifications may be constitutional. But, the use of a racial classification must be "precisely tailored to serve a compelling governmental interest"[34] because "racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination."[35] He rejected all arguments favoring benign racial classifications, making clear his view that the United States is a nation of minorities and that the constitutional guarantees of equal protection "are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality . . . ."[36]

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[31] Although five Justices voted in favor of a color-conscious interpretation of Title VI, four of the votes (Mr. Justice Brennan's group) disposed of no issue, and consequently they cannot be counted as an authoritative interpretation of Title VI.

[32] Bakke-Powell at 2748.

[33] *Id.*

For Mr. Justice Powell, the constitutionality of Davis's Special Admissions Program boiled down to whether it was precisely tailored to achieve a compelling state interest. He therefore turned to the four objectives the University offered in justification of its program: "(i) reducing the historic deficit of traditionally disfavored minorities in medical schools and the medical profession; (ii) countering the effects of societal discrimination; (iii) increasing the number of physicians who will practice in communities currently underserved; and (iv) obtaining the educational benefits that flow from an ethnically diverse student body."[37]

Justice Powell made short work of the first objective. "If petitioner's purpose is to assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin, such a preferential purpose must be rejected not as insubstantial but as facially invalid. Preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake. This the Constitution forbids."[38]

Considering Davis's second objective, Mr. Justice powell indicated that a state does have a "legitimate and substantial interest"[39] in countering the continuing effects of past societal discrimination. But, he observed with specific focus on Davis's Program, the Board of Regents had not attempted, and was "in no position" to make the necessary factual findings identifying the nature and continuing extent of past societal discrimination and establishing carefully tailored remedies precisely responsive to the past discrimination. Mr. Justice

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[34] *Id.* at 2753.
[35] *Id.* at 2748.
[36] *Id.* at 2750.
[37] *Id.* at 2757.
[38] *Id.*
[39] *Id.*

Powell ruled that these functions could be performed only by a judicial or legislative authority or an administrative agency that specifically had been charged with the authority and given the "capability to establish, in the record, that the [remedial race] classification is responsive to identified discrimination."[40]

Justice Powell held Davis's third objective could be "sufficiently compelling to support the use of suspect [racial] classification"[41] in some circumstances. "But there is virtually no evidence in the record indicating that [Davis's] special admissions program is either needed or geared to promote that goal."[42] In other words, the University "simply has not carried its burden of demonstrating that it must prefer members of particular ethnic groups over all other individuals in order to promote better health care delivery to deprived citizens."[43]

Davis's fourth objective, could, in some circumstances, support a university's use of a racial classification but it could not support the actual use of the racial classification made by Davis in its Special Admissions Program. Justice Powell began by stating that "the attainment of a diverse student body . . . clearly is a constitutionally permissible goal for an institution of higher education" because "the [academic] freedom of a university to make its own judgments as to education includes the selection of its student body."[44] Thus, Mr. Justice Powell concluded that "the interest of diversity is compelling in the context of a university's admissions program, the question remains whether [Davis's] program's racial classification is necessary to promote this interest."[45] In other words, is there available a less drastic alternative to Davis's use of its racial classification or is Davis's use the only effective way to secure a diverse student body? Justice Powell believed a less drastic alternative existed.

Mr. Justice Powell quickly ruled that Davis's "argument that [its program] is the only effective means of serving the interest of diversity is seriously flawed" because "in its most fundamental sense the argument misconceives the nature of the state interest that would justify consideration of race or ethnic background."[45a] Justice Powell held Davis's program unconstitutional reasoning:[46]

> It is not an interest in simple ethnic diversity, in which a specified percentage of the student body is in effect guaranteed

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[40] *Id.* at 2759.
[41] *Id.*
[42] *Id.*
[43] *Id.*
[44] *Id.* at 2760.
[45] *Id.* at 2761.
[46] *Id.* at 2761-62.

> to be members of selected ethnic groups, with the remaining percentage an undifferentiated aggregation of students. The diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element. Petitioner's special admission program, focused *solely* on ethnic diversity, would hinder rather than further attainment of genuine diversity.
>
> Nor would the state interest in genuine diversity be served by expanding petitioner's two-track system into a multitrack program with a prescribed number of seats set aside for each identifiable category of applicants. Indeed, it is inconceivable that a university would thus pursue the logic of petitioner's two-track program to the illogical end of insulating each category of applicants with certain desired qualifications from competition with all other applicants.

Justice Powell ruled that[47]

> In summary, it is evident that the Davis special admission program involves the use of an explicit racial classification never before countenanced by this Court. It tells applicants who are not Negro, Asian, or "Chicano" that they are totally excluded from a specific percentage of the seats in an entering class. No matter how strong their qualifications, quantitative and extracurricular, including their own potential for contribution to educational diversity, they are never afforded the chance to compete with applicants from the preferred groups for the special admission seats. At the same time, the preferred applicants have the opportunity to compete for every seat in the class.
>
> The fatal flaw in petitioner's preferential program is its disregard of individual rights as guaranteed by the Fourteenth Amendment. Shelley v. Kraemer, 334 U.S.1, 22, 68 S. Ct. 836, 846, 92 L.Ed.2d 1161 (1948). Such rights are not absolute. But when a State's distribution of benefits or imposition of burdens hinges on the color of a person's skin or ancestry, that individual is entitled to a demonstration that the challenged classification is necessary to promote a substantial state interest. Petitioner has failed to carry this burden. For this reason, that portion of the California court's judgment holding petitioner's special admissions program invalid under the Fourteenth Amendment must be affirmed.

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[47] *Id.* at 2764.

The Phantom Judgment and Injunction

To this point I have dealt with one and only one issue presented by the *Bakke* case: whether the California Supreme Court judgment ordering Bakke's admission should be affirmed. In order to resolve this issue, assuming Bakke's standing, the Supreme Court necessarily had to pass on whether Davis's Program was lawful. All nine Justices spoke to this issue dividing by a vote of 5 to 4 in favor of affirmance, and holding Davis's Program illegal.

But, on the other hand, five Justices, Justice Powell and Justice Brennan's group of four, believed a second issue was presented by the case, and they ruled on it. The Stevens group denied that a second issue was presented to the Court. Obviously, the presence or absence of this second issue is of crucial importance in interpreting the *Bakke* case because if the issue were properly presented, then the Powell-Brennan ruling on this issue is holding, and part of the law of the case. But, if this issue were not before the Court, then the Powell-Brennan views are mere *dicta*, albeit strong *dicta*. The second issue is whether there actually ever was any judgment of California's Supreme Court enjoining the University from according any consideration to race in its admissions decision which properly was before the U.S. Supreme Court for decision?

Mr. Justice Powell ruled on this second issue indirectly. When ruling on the first issue from a "diversity" point of view, Mr. Justice Powell found two defects in Davis's Special Admissions Program. First, Davis's Program misconceived the character of the state interest that would justify a diversity admission program. Davis's program focused solely on racial diversity and that focus hindered rather than furthered the attainment of genuine diversity. Second, a less drastic alternative existed to Davis's Program. Moreover, this alternative allowed race to be used and would further the attainment of genuine diversity in a student body:[48]

> In such an admissions program, race or ethnic background may be deemed a "plus" in a particular applicant's file, yet it does not insulate the individual from comparison with all other candidates for the available seats. The file of a particular black applicant may be examined for his potential contribution to diversity without the factor of race being decisive when compared, for example, with that of an applicant identified as an Italian-American if the latter is though to exhibit qualities more likely to promote beneficial educational pluralism. Such

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[48] *Id.* at 2762-63.

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> qualities could include exceptional personal talents, unique work or service experience, leadership potential, maturity, demonstrated compassion, a history of overcoming disadvantage, ability to communicate with the poor, or other qualifications deemed important. In short, an admissions program operated in this way is flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight. Indeed, the weight attributed to a particular quality may vary from year to year depending upon the "mix" both of the student body and the applicants for the incoming class.

It is clear that Mr. Justice Powell would allow race to be a factor to be taken into consideration in a university's admissions process. His approach differs fundamentally from that of Mr. Justice Brennan's group, which also would allow race to be used, in that Justice Powell's approach does not include any constitutional guidance on which racial groups might be the appropriate candidates for special consideration. Mr. Justice Brennan's group of four Justices would limit special admission considerations solely to racial groups currently suffering from the lingering effects of past racial discrimination, irrespective of whether any particular applicant from such a racial group had personally been subjected to past racial discrimination. In light of his diversity approach, Mr. Justice Powell stated that[49]

> In enjoining [Davis] from ever considering the race of any applicant, however, the courts below failed to recognize that the State has a substantial interest that legitimately may be served by a properly devised admission involving the competitive consideration of race and ethnic origin. For this reason, so much of the California court's judgment as enjoins petitioner from any consideration of the race of any applicant must be reversed.

Although Mr. Justice Brennan's group of four Justices believed that Davis's program was neither unconstitutional nor illegal, they joined in agreement with Justice Powell's above paragraph, therefore making "five votes reversing the judgment below insofar as it prohibits the University from establishing race-conscious programs in the future."[50]

The question is whether these five votes of the Powell-Brennan combination are *dicta* or holding? Before they can constitute a holding in the case, they must dispose of an issue properly before the court. In short, there first must have been a California Supreme Court judgment ordering Davis not to establish a race-conscious admission program in the future, and secondly, that judgment must properly have been before the Supreme Court of the United States. It is clear that no such judgment existed nor was any such judgment before the Supreme Court in the *Bakke* case. Thus, the Powell-Brennan views on this point constitute *dicta*.

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[49] *Id.* at 2764.

[50] Bakke-Brennan at 2767.

In California's trial court, the trial judge, F. Leslie Manker, entered the following four paragraph judgment:[51]

> 1. Defendant, the Regents of the University of California, have judgment against plaintiff, Allan Bakke, denying the mandatory injunction requested by plaintiff ordering his admission to the University of California at Davis Medical School;
>
> 2. That plaintiff is entitled to have his application for admission to the medical school considered without regard to his race or the race of any other applicant, and defendants are hereby restrained and enjoined from considering plaintiff's race or the race of any other applicant in passing upon his application for admission;
>
> 3. Cross-defendant Allan Bakke have judgment against cross-complainant, the Regents of the University of California, declaring that the special admission program at the University of California at Davis Medical School violates the Fourteenth Amendment to the United States Constitution, Article 1, Section 21 of the California Constitution, and the Federal Civil Rights Act [42 U.S.C. § 2 000(d)];
>
> 4. That plaintiff have and recover his court costs incurred herein in the sum of $217.35.

Paragraph three was the result of the University's cross-complaint and the remaining three paragraphs were a result of Bakke's complaint. It should be noted that no part of the trial court's judgment enjoins Davis "from establishing race-conscious programs in the future."[52]

The considerations lying behind California's trial court's judgment are of critical importance. Bakke petitioned the trial court to order his immediate admission. Bakke's request was based on his claim of exclusion on racial grounds from the entire first-year medical class. Paragraph one of the judgment refused to grant Bakke's request for admission because of a belief that Bakke failed to prove his case. The reasons for this view are two. First, the trial court placed the burden on Bakke to show that his exclusion from the entire first-year medical class necessarily was due to Davis's Special Admission Program. Second, the trial court ruled that "with reference to [Bakke's] contention that he would have been admitted to the Medical School had it not been for the special admissions program, the Court finds that this contention has not been sustained by the evidence."[53] In an addendum the trial court judge repeated that "had the evidence shown that [Bakke] would have been admitted if the 16 positions had not been reserved, the Court would have ordered him admitted." In other words, Bakke failed to show that his complete exclusion from medical school—from a federally funded program—which is the type of exclusion crucial to the ruling of Mr. Justice Stevens's group, was due to racial considerations. Thus, the trial court, in paragraph one of its judgment, refused to order Bakke's admission to the Medical School.

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[51] Bakke-Stevens at 2809, note 2.
[52] Bakke-Brennan at 2767.

On the other hand, Bakke's proof did show that he had been excluded by Davis's Special Admissions Program, and on racial grounds, from competing for the 16 places reserved exclusively for minority applicants. Bakke was allowed to compete only for the 84 places open to non-minority applicants, but minority applicants competed for all 100. This exclusion from competition is the type of exclusion that is at the heart of Mr. Justice Powell's views on the first issue. California's trial court ruled that "there appears to the Court to be at least a possibility that he [Bakke] might have been admitted absent the 16 favored positions on behalf of minorities."[54] Since Bakke had proved that he had been excluded on racial grounds from competing for each of the 100 places available, the trial court judge ruled that Bakke was "entitled to have his application considered without regard to his race or the race of any other applicant,"[55] and Trial Judge F. Leslie Manker entered paragraph two of the judgment ordering that Bakke have his application to Medical School evaluated without any consideration given to Bakke's "race or the race of any other applicant."[56]

The Trial Court Judge's addendum opinion continued by concluding, *inter alia*, "that the use by defendants [University] of this racially discriminatory admissions program, herein found to be unconstitutional, and which sets a quota in favor of racial or ethnic minorities, amounted to an unfair and arbitrary admissions procedure, warranting judicial intervention."[57] Therefore, the judge entered paragraph three of the judgment holding Davis's Special Admissions

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[53] CLEO, Bakke v. Regents of University of California, Notice of Decision, 190-91 (1978).

[54] *Id.*

[55] *Id.* at 206.

[56] *Id.*

[57] *Id.* at 195.

Program unconstitutional under the Fourteenth Amendment and illegal under Title VI.

The trial court's judgment was appealed to California's Supreme Court. The University took its appeal to California's Supreme Court from "Paragraphs 2, 3 and 4" of the trial court judgment,[58] and Allan Bakke took his cross-appeal from that part of the trial court's judgment "set forth as paragraph 1."[59]

The California Supreme Court's ruling denied the validity of the University's appeal on paragraph 3 of the trial court's judgment, holding that Davis's "special admission program is unconstitutional because it violates the rights guaranteed the majority by the equal protection clause of the Fourteenth Amendment of the United States Constitution."[60] This holding requires California's Supreme Court to affirm paragraph 3 of the trial court's judgment. California's Supreme Court did not have to rule on the validity of the University's appeal from paragraph 2 of the trial court's judgment which rested upon the exclusion of Bakke from competition for each of 100 places, because the Court upheld Bakke's cross-appeal from paragraph 1 of the judgment. The Court ruled that the trial court was mistaken in placing the burden of proof on Bakke.

"[W]e hold that the trial court should have ruled that since Bakke successfully demonstrated that the University had discriminated against him, the burden of proof shifted to the University to establish that he would not have been admitted to the 1973 or 1974 entering class without the invalid preferences."[61] The question no longer was whether Bakke should have his application evaluated on racially neutral grounds, but rather whether Bakke's outright admission to medical school should be ordered. Given this ruling on paragraph 1 of the trial court's judgment, California's Supreme Court ordinarily would have "remand[ed] the case to the trial court for the purpose of determining, under the proper allocation of the burden of proof, whether Bakke would have been admitted to the 1973 or 1974 entering class absent the special admission program."[62]

But, the case was never actually remanded to the trial court. The reason is that in its subsequent petition for a rehearing to California's Supreme Court the University admitted that it could not meet the burden of proving that Davis's Special Admissions Program did not produce Bakke's exclusion.[63] In light of this concession there was no longer any need for a remand. From a legal point of view the case was to be considered just as though Bakke initially had proved that Davis's Program resulted in his exclusion. Thus, paragraph 2 dropped competely out of the case. There no longer was any need for the medical school to evaluate Bakke's application for medical school without consideration of his "race or the race of any other applicant."[64] Instead, Bakke now was in the position of having been excluded because of an unconstitutional admissions program, and the correct judicial remedy, on these premises, was to order his admission, which California's Supreme Court directed the trial court to do. Bakke's case had moved from one type of exclusion--the exclusion from competition for all 100 seats—to a second type of exclusion—the total exclusion from medical school and from a federally financed program of medical education because of Davis's illegal admissions program.

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[58] *Id.* at 207.
[59] *Id.* at 210.
[60] Bakke v. Regents of Univ. of Calif., 553 P.2d 1152, 1172 (1976).
[61] *Id.*
[62] *Id.*

After the University's concession, paragraph 2 of the trial court's judgment simply disappears as irrelevant, leaving only paragraphs 1, 3 and 4. The fact that paragraph 2 disappeared was recognized by California's Supreme Court because it omitted that paragraph when it entered the following judgment indicating that Bakke had won his case and that the University had lost the issue it raised by cross-complaint:[65]

> "IT IS ORDERED, ADJUDGED, AND DECREED by the Court that the judgment of the Superior Court County of Yolo "in the above-entitled cause, is hereby affirmed insofar as it determines that the special admission program is invalid; the judgment is reversed insofar as it denies Bakke an injunction ordering that he be admitted to the University, and the trial court is directed to enter judgment ordering Bakke to be admitted. Bakke shall recover his costs on these appeals."

It should be noted that contrary to the assertions of Mr. Justices Powell and Brennan, no part of the California Supreme Court judgment, in any way, enjoins the University "from according any consideration to race in its admission process."[66] Mr. Justice Stevens is clearly correct when he states that it "is therefore perfectly clear that the question whether race can ever be used as a factor in an admissions decision is not an issue in this case, and that discussion of that issue is inappropriate."[67]

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[63] Bakke-Powell at 2743.

[64] *Id.* at 2738.

[65] *Id.* at 2810, note 5.

[66] Bakke-Powell at 2739.

[67] Bakke-Stevens at 2810.

Mr. Justice Powell admits as much in a footnote. When seeking to identify the basis of the alleged second issue, he does not identify any part of the California Supreme Court judgment that actually presents a second and highly abstract issue whether race as a factor can ever be used in a university's admission decisions. Instead, he states that when the California Supreme Court held Davis's Special Admission Program unconstitutional, its *OPINION* "left no doubt that the reason for its holding was [Davis's] use of race in consideration of any candidate's application . . . [and] in explaining the scope of its holding, the court quite clearly stated that [Davis] was prohibited from taking race into account . . ."[68] But, of course, these statements are in the California Supreme Court's opinion in support of its judgment and not in the judgment itself. The U.S. Supreme Court "reviews judgments, not statements in opinions."[69] Thus, clearly, no second issue existed or properly was before the Court for decision. if each reason given by a lower court in support of its judgment were to be considered reviewable as an "issue" by the Supreme Court of the United States, the consequence would be an unwieldy chaos.

I conclude that there was one and only one issue before the U.S. Supreme Court. That issue was whether the Calfironia Supreme Court's judgment ordering Bakke's admission should be affirmed and this issue necessarily implicated the validity of Davis's Special Admission Program. Nine Justices ruled on this issue, splitting 4-1-4. A majority of five Justices—the Stevens group and Mr. Justice Powell—struck Davis's Program as illegal, but for different reasons. Thus, there is no consistent rationale or law of the case. There was no second issue before the Court for decision. Everything else in the six opinions is *dicta*, perhaps strong *dicta*, but *dicta* nonetheless.

The Brennan Opinion

Mr. Justice Brennan wrote for himself and Justices Blackmun, Marshall and White. This group believed that Title VI and the Fourteenth Amendment's equal protection clause mean the same thing and that to determine whether Title VI is violated one first must determine whether the Fourteenth Amendment had been violated. The four Justices believed a race-conscious admissions program would be valid under Title VI and under the Fourteenth Amendment so long as it could pass three tests: First, "a state government may adopt race-conscious programs if the purpose of such programs is to remove the disparate racial impact its actions might otherwise have and if there is reason to believe that the disparate impact is itself the product of past discrimination, whether its own or that of society at large."[70] Secondly, the use of race as a factor in admissions must be "reasonably used in light of the program's objectives."[71] And, thirdly, the use of race cannot be used in a way that "stigmatizes any discrete group or individual."[72]

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[68] Bakke-Powell at 2738, note **.

[69] Black v. Cutter Labs., 351 U.S. 292 (19—).

Justice Brennan believed Davis's Program passed the first test because data showed severe minority underrepresentation in medicine and pervasive racial discrimination that significantly lowered the academic achievement of minority students such that "in the absence of a special admissions program, access of minority students to the medical school would be severely limited."[73]

The Davis Program also passed the second and third tests of Mr. Justice Brennan's group. Since the program admitted only those qualified to study medicine and brought the races together in medical school classes and elsewhere after admission, there was no stigmatization. The use of race was deemed "reasonable" because no other method would produce a substantial number of minority students in medical school. If the program were open to all "disadvantaged" students, instead of being based on race, then the program would probably be dominated by non-minorities.[74]

As indicated above, the views of Mr. Justice Brennan's group of four Justices should be considered as falling into two categories. First, they should be considered as a dissent from the disposition of the sole issue that was before the Court. Second, they should be considered as strong *dicta* of what this group would vote in a future case.

SUMMARY OF BAKKE

In summary, it can be said that *Bakke* held Davis's Program to be illegal but without any consistently agreed upon rationale by the majority. Thus, there is no law of the case. It also can be said that *Bakke* yields no definitive interpretation of Title VI on whether that Title's content is the same or different from the equal protection clause. Although five Justices voted that Title VI and the Fourteenth Amendment meant the same thing, four of the five votes (those of the Brennan group) disposed of no issue that properly was before the Court. Mr. Justice Powell was the fifth Justice to hold the view, and his vote was dispositive on the issue properly before the Court. But, the other four votes that disposed of that issue, the votes of the Stevens group, were based on the view that Title VI and the Fourteenth Amendment's equal protection clause had separate, independent and different meanings. Thus, unfortunately, the proper meaning and coverage of Title VI remains in considerable question and cannot be stated with confidence.

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[70] Bakke-Brennan at 2789.

[71] *Id.* at 2791.

[72] *Id.*

[73] *Id.*

[74] *See,* Morris, *Constitutional Alternatives To Racial Preferences In Higher Education,* 17 Santa Clara L. Rev. 279 (1977).

Five members of the Court, a majority, provided *dicta* indicating that, in certain circumstances, a university could use race as a factor in admissions. But these five Justices split four to one on precisely what type of use of a racial classification would be valid. Mr. Justice Powell limited the use of race to a program seeking "genuine" diversity in its student body, and would not permit a university, by itself, to use race as a means for redressing the lingering effects of past societal discrimination. On the other hand, Mr. Justice Brennan's group of four would allow a university to use race in its admissions program in order to redress the lingering effects of past societal discrimination so long as the program passed his three tests, outlined above. Mr. Justice Powell's "diversity" program passes Mr. Justice Brennan's three tests; thus, all five Justices agree, in *dicta*, that a university could validly use race in a program designed to produce genuine diversity in its student body.

IMPLICATIONS OF *BAKKE* FOR ADMISSION

Bakke settles so little that it is virtually useless as a precedent. The Court invalidated Davis's Program, which both Justice Powell and the Stevens group referred to as an exclusionary system, and except for another program virtually identical to it, *Bakke* would not be controlling. Even another program virtually identical to Davis's might be upheld by the Court because Justice Powell indicated that he might favor such a program if appropriate judicial, legislative or administrative efforts have been made to justify such a program as a remedy for past racial discrimination.

Many possible admissions systems might pass muster. For example, Justice Powell was the only Justice expressly to condemn Davis's two-track system of admissions—one for minorities and the other for nonminorities. So long as no one was excluded on racial grounds, Mr. Justice Stevens's group would not find a two-track system objectionable, and Mr. Justice Brennan's group did not. Justice Powell's approach permits extremely broad discretionary powers to be vested in admission authorities. The Stevens group was silent on the use of race in a flexible, discretionary program, while the Brennan group presumably would permit it. Thus, no Justice spoke against the use of race within a flexible and discretionary admissions program. Courts have a long history of deferring to decisions made by administrative officers so long as it is clear that the discretion has been vested in that officer. Although the permissible range of discretion might be less when race is a decision factor, it appears a majority of the Court would permit the use of informed administrative judgment rather than insist on rigidly articulated standards to control that judgment.

There are potentially many programs that *Bakke* would permit. One example will suffice. Suppose Davis's Medical School sets a target range for its admission committee of somewhere between 10 to 25 minority students in order to insure diversity in its first-year entering class of 100. The admissions process is unitary now in the sense that there is only one admission committee. It has been given vast discretionary powers. It considers every application; selecting students on the basis of a set of criteria that includes predicted academic performance and a variety of other criteria linked to a student's potential for contributing to the medical school and to the profession. Criteria indicating potential contribution to school or the profession are similar but not identical to Mr. Justice Powell's criteria showing genuine diversity; e.g., exceptional personal talents, unique work or service experience, leadership potential, ability to communicate with average people and demonstrated compassion. The admission committee considers race only after assessing an applicant's potential contribution and predicted performance.

This example does not use *Bakke's* two-track system of admissions. It allows every applicant to compete with every other applicant for every available place. Thus, Justice Powell's concerns are allayed. he would allow race to function as a "plus", as it does in the example. This example also differs from *Bakke's* quota in that it gives the committee a range to work within, allowing individual comparative assessments to be made of all applicants. The example is like *Bakke* in that it is possible for a racial "plus" awarded to an applicant later to prove decisive in the admission decision. Nevertheless, judged by the *dicta* in *Bakke*, this program is one that might be upheld by five Justices of the Supreme Court.

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7

Unintended Impact of Supreme Court School Discipline Decisions

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The impact of a United States Supreme Court decision occurs on three levels. The first is the impact on the litigants themselves; the side which wins seeks to have the decision implemented and the side which loses has a number of options, ranging from full compliance to total non-compliance. On the second level, the decision may have a measurable effect on the individuals within the institution at which the litigation is directed. A school bussing decision, for example, may or may not increase the academic achievement scores of the students in districts where bussing occurs. Effects, in this sense, are changes which can be quantified and measured. Finally, a Supreme Court decision may have consequences unintended or unforeseen by either of the parties or by the Court. These unintended consequences, the movement of whites to the suburbs to avoid desegregation, for example, may be of greater importance than either the extent of compliance or the direct effects of a decision.

I am going to examine all three levels of impact, emphasizing the unintended consequences of the Supreme Court decision in *Goss v. Lopez.*[1] As part of a larger study of school discipline, we looked closely at two Wisconsin school districts where the impact of *Goss* was assessed.[2] One of the districts studied was a middle-sized urban area and the other a rural district, and while looking at only two districts is a limitation, there is nothing to suggest that the impact of *Goss* was markedly different elsewhere.[3]

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[1] 419 U.S. 565 (1975). The *Goss* decision requires that students about to be suspended from school for short periods of time, up to ten days, be given oral or written notice of the charges, an explanation of the evidence if the charges are denied, and the opportunity to tell their side of the story before suspension. For an early discussion of *Goss* and two other important discipline cases, *Wood v. Strickland* (1975) and *Baker v. Owen* (1975), *see* R. Phay, *1975 Student Discipline Decisions by the United States Supreme Court*, in New Directions in School Law (NOLPE 1976). In *Carey v. Piphus*, 46 U.S.L.W. 4224 (March 21, 1978), the Supreme Court held that in the absence of evidence that a student had suffered a tangible injury, denial of the due process hearing required by *Goss* could be actionable only for nominal damages not to exceed one dollar. *Carey* was decided after the research reported in this paper was conducted.

IMPACT AS COMPLIANCE

Before looking at whether or not there was compliance with *Goss*, some consideration of how word of Supreme Court decisions reaches school districts is in order. This is less of an issue for the litigants themselves; the impact of a Supreme Court decision occurs immediately for the parties involved in the case. Copies of the decision are available and the opinion dictates the subsequent behavior required of the litigants. Attorneys and their clients on both sides have considered the possible outcomes and have prepared responses based on most contingencies. Social scientists studying the impact of court decisions on litigants have found a variety of responses: 1) full compliance, including both the letter of the decision and some additional activities, such as instituting policy changes to insure that the intent of the decision is carried out in related subsequent cases; 2) formal compliance, the response required for the case at hand; 3) evasion, the seeking of ways to circumvent the decision, including delay, such as filing additional legal petitions in complex cases on points not covered in the opinion, or 4) non-compliance, requiring the party which won the case to take additional legal action to obtain the fruits of victory.[4]

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[2] The research was supported by three grants from the Wisconsin Council on Criminal Justice, using LEAA funds, to the Center for Public Representation, Madison, Wisconsin. The project was designed in 1976 and data were gathered in spring of 1977. Data analysis and the final project report are in the final stages of completion. For a short discussion of preliminary findings *see* H. Lufler, *Discipline: A New Look at an Old Problem*, 59 Phi Delta Kappan 6, (Feb. 1978).

[3] The research involved three methods of data collection: questionnaires, interviews, and anthropological observation. Questionnaires were completed by about 1,550 students and 225 teachers in grades 7-12 in six schools. Interviews were conducted with teachers, students and other school personnel and observations were made of principals disciplining students over extended periods of time.

[4] For a discussion of compliance see articles by R. Johnson and R. Birkley, reprinted in M. Felley and T. Becker, eds., The Impact of Supreme Court Decisions, 2nd ed., (New York: Oxford University Press, 1973), and M. Sosin, *Toward a Theory of Legal Impact: Some Perspectives on Compliance*, Institute for Research on Poverty Discussion Paper, 389-77, (Madison: University of Wisconsin, 1977). Several studies have looked at compliance with Supreme Court decisions in particular case areas. Most studied are the school prayer and defendant's rights areas. For thorough, recent works in these areas, see F. Sorauf, The Wall of Separation—The Constitutional Politics of Church and State (Princeton: Princeton University Press, 1976); and S. Wasby, Small Town Police and the Supreme Court (Lexington, Massachusetts: D.C. Heath and Company, 1976).

The impact of court decisions on parties beyond the actual litigants is more problematic. In some instances there will be organized interests in other communities waiting for a Supreme Court decision. But the Supreme Court does not mail copies of its opinions to all persons or institutions similarly situated to the case litigants. Press accounts of the decisions are generally inadequate, particularly in cases where the facts and circumstances are complicated. Nor is there any guarantee that news media coverage will even include cases of interest to educators or other groups. For these reasons there is generally a "two-step flow" where those not involved in a case first hear about the decision.[5] For school districts, this process frequently involves the school board's attorney who explains the decision to the appropriate administrator. Attorneys obtain the requisite information about the case through a variety of means, including reading the decision itself, reading about it in professional publications, discussing it with other professionals at meetings or conventions, or obtaining information from organizations established for the purpose.

This process whereby information about Supreme Court cases is disseminated works imperfectly, especially where action is required of a large number of persons.[6] A decision affecting all school districts, for example, requires that each district actually have an attorney or other person keeping abreast of current legal developments. This is not always the case. Groups such as the ACLU can also press for a local school district to implement a new Supreme Court decision. In places where no one hears of a decision or no one asks that it be implemented, nothing may happen at all, regardless of what the Court has said.

Information about the decision is no guarantee that it will be implemented in districts not involved in the original litigation. Studies of the school prayer decisions, for example, found that the attitudes of the administrators themselves were crucial in determining whether that district responded or not.[7] In addition to administrator attitudes, the roles of school boards and other community elites were relevant in explaining the policies adopted by school districts.[8]

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[5] Katz, *The Two-Step Flow of Communication*, 21 Public Opinion Quarterly 61 (Spring 1957).

[6] *See* S. Wasby, *The United States Supreme Court's Impact: Broadening our Focus*, 49 Notre Dame Lawyer 1023 (1975). A good discussion of how a decision filters down to communities is contained in N. Milner, The Court and Local Law Enforcement (Beverly Hills: Sage Publications, 1971).

[7] Sorauf, *see supra* note 4 at chs. 4-5, K. Dolbeare and P. Hammond, The School Prayer Decisions—From Court Policy to Local Practice (Chicago: University of Chicago Press, 1971).

[8] *Id.*

In the Wisconsin school districts we studied, we found behavior consistent with formal compliance with the *Goss* decision. Principals did provide students with an opportunity to tell their side of the story before they were suspended from school.[9] We are uncertain whether this same behavior occurred before the *Goss* decision, though we suspect it did. In any event, principals knew that the conversation they held with students was a "hearing" under the terms of *Goss*.

The principals had learned this requirement "somewhere" but were uncertain whether the information had arrived in an administrative memo, a conference or from a publication. In any event, the hearing was not particularly lengthy and, in fact, the students might not have known it had occurred at all. It was not referred to as a hearing and it was not formally structured. The principal did not use quasi-legal terminology, such as "here are the facts." Instead he or she would say, "Mrs. X caught you smoking in the bathroom," and would wait for the student's response. The conversation would last a few minutes longer and the students would, in most schools, be suspended.

The use of the suspension penalty was completely at the discretion of the principal and one principal in the schools we studied did not use punishment at all. He felt the penalty "didn't work" and that students misbehaved in order to be suspended; in his view the penalty was seen by students as a reward for rule-breaking. Another principal routinely used the penalty on an almost daily basis while others used it sparingly. Those who did apply the penalty, however, held a *Goss* hearing and complied with the decision. No principal went further by seeking to make suspension "more fair" in other respects, by seeking, for example, to even out the penalty's use across schools.

IMPACT AS EFFECTS

The question of compliance is distinct from that of a decision's effects. Supreme Court justices may have a notion of the effects which their decisions will have and these are often argued by expert witnesses and in case or *amicus* briefs.[10] Thus it may be argued that school bussing, for example, may have a positive impact on students' achievement. But justices do not base their decisions in terms of intended effects unless they are related to a constitutionally protected interest. Social scientists, however, have recently been focusing on effects questions and federal research dollars have been liberally applied in the search for measurable changes attributable to a court decision. Finding and isolating variables to study have proved difficult and data on such topics as desegregation, bussing, white flight, and school district spending have been very controversial and open to alternate interpretation.[11]

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[9] This was determined by observation. While it is possible that administrators modified their behavior when observors were present, the length of time over which observation occurred, at intervals of several weeks, made this less likely. Many suspensions were meted out by assistant principals who often had the central responsibility for discipline. In all, about twelve persons with suspension powers were observed. They are referred to as "principals" in the text.

[10] There is a growing literature on the use of "expert witnesses" who argue the "effects" of educational decisions. *See* P. Rosen, The Supreme Court and Social Science (Urbana: University of Illinois Press, 1972), M. Katz, *The Unmasking of Dishonest Pretensions: Toward an Interpretation of the Role of Social Science on Constitutional Litigation, 6 American Sociologist 54 (June, 1971), and P. Lochner, Some Limits on the Application of Social Science Research in the Legal Process*, 1973 Law and Social Order 815.

The *Goss* majority opinion made a number of empirical assumptions regarding the effect of requiring a skeletal due process hearing before a short-term suspension. First, the majority assumed that even a short suspension raised significant property and liberty interests—that missed school work could make a calculable difference to the student and that the presence of a suspension on the student's record was also a significant factor in subsequent employment or treatment in school. This led the Court to the requirement of the hearing to "make sure that an injustice is not done."[12] At the same time, the majority argued that the hearing requirement would not place an undue burden on school administrators. As Justice White wrote, the hearing was "less than a fair-minded school principal would impose upon himself in order to avoid unfair suspensions."[13] Concern with unfairness and erroneous suspensions, then, was at the heart of the majority opinion.

The majority in *Goss* disagreed with the majority on all of the effects questions. Justice Powell, for the dissent, argued that the deprivation caused by a suspension was so insignificant as to not warrant constitutional protection.[14] He also warned that the majority opinion represented "an unprecedented intrusion into the process of elementary and secondary education"[15] and that, "Few rulings would interfere more extensively in the daily functioning of schools . . . ."[16]

The long-term effect of suspension is not a subject which we were able to investigate.[17] We were able to consider perceptions of fairness associated with suspension and the effect of the hearing requirement on school management. As was already suggested, the hearing itself did not place any special burden at all on principals. Nor was it perceived by students to represent a "hearing" at all. In fact, when asked on the research project's questionnaire if they had been given "a chance to tell their side of the story" before being suspended, half of the 128 students in the sample who had been suspended responded that they had not been given the chance. While we initially thought that this finding represented non-compliance with *Goss*, we discovered through interviews that students had, in fact, had a chance to talk about their alleged offense but their version of the facts had not been accepted or, in some cases, had not been "taken seriously." Principals, then, were not required to accept the students' perceptions of what had happened and it can be argued that even students' perceptions of fairness in the suspension process was not affected at all by *Goss*.

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[11] For a focus on the variables question, *see* H. Garfinkel, *Social Science Evidence and School Desegregation Cases*, 21 Journal of Politics 37 (1959).

[12] 419 U.S. 565, at 580.

[13] *Id.* at 583.

[14] *Id.* at 587.

[15] *Id.* at 585.

[16] *Id.* at 591.

[17] A number of hypotheses have been advanced about these. *See* the *Goss* brief *amici curiae* submitted by the Children's Defense Fund and the American Friends Service Committee; and the Children's Defense Fund, *School Suspensions* (Washington, D.C.: The Washington Research Project, Inc., 1975).

Suspension, then, did not appear to be much affected by the decision. Principals used the penalty based on their own perceptions of its suitability for a particular case. Sometimes students were suspended so that the principal could "back a teacher." And if fairness of the process is the central concern, our research suggests that the teacher's decision to send a student to the office is the key decision in the suspension process.[18] We found evidence of discrimination against students with certain characteristics principally when the teacher was deciding how to respond to a disciplinary incident.[19] In sum, if increasing fairness in school discipline was the intent of the *Goss* majority, then the decision was largely beside the point. An imperceptible change in the procedures at the end of suspension process had no effect in this regard. Most unfairness occurred earlier.

IMPACT AS UNINTENDED EFFECTS

Studies of court decision impact and decision effects have almost entirely focused on intended or predicted relationships among variables and have seldom considered what I call "unintended impact." This form of impact is by its definition difficult to study since it is not easy to examine variables which are peripheral to the decision itself. If, however, school districts across the country engage attorneys where they had none before, or if state legislatures begin to enact legislation in areas related to the court cases, then these are important, if unintended, consequences of the decisions. Some scholars also have argued that loss of public esteem in the court was an important by-product of the Court's controversial decisions in cases involving school prayer, desegregation and defendant's rights and that, at some point, the Court goes "too far" with little benefit to the interest it is protecting.[20]

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[18] Teachers respond to similar events in quite different ways, even when there are clear district rules regarding a particular rule infraction.

[19] This is briefly reported in Lufler, *supra* at note 2 at 425.

As was noted, the *Goss* decision did not apparently change what the principals in the schools we studied actually did as they suspended students. It did, however, contribute to the feeling they had that "outsiders" and "the courts" were increasingly taking control of areas where administrators had previously enjoyed complete control. This feeling was held by a larger number of teachers. Of the 205 teachers responding to a questionnaire item, 45 percent felt that "too much interference from courts" was "very important" as a cause of school discipline problems.[21]

Teachers, however, lacked understanding of the specifics of *Goss* and other discipline decisions. The questionnaire responded to by the teachers in the six schools we studied asked a series of true-false questions about the principal holdings of several Supreme Court cases. Teachers were given the option of checking "not sure" to the items; about 200 teachers responded to each. Of those responding, 54 percent knew that a student had the right to a hearing before a short-term suspension from school; 27 percent thought they did not and 19 percent weren't sure. A similar percentage, 53 percent thought that students had the right to a lawyer before being suspended, 12 percent thought they did not and 35 percent weren't sure. These responses are evidence of substantial lack of information and confusion on the part of teachers regarding the *Goss* case. When combined with interview data, it becomes clear that many teachers feel that the courts have gone further in extending due process rights to students than is actually the case.

When the junior and senior high school students in the sample (1,466 respondents, on the average) were questioned, 28 percent knew that a hearing before a short-term suspension was required, 29 percent said it wasn't, and 43 percent weren't sure. Only a few students, 22 percent thought they had the right to a lawyer before the suspension hearing, 28 percent knew they didn't and 50 percent weren't sure. Substantial confusion existed for students on the other items as well. Many students frequently in trouble in school, however, expressed the sentiment in the project interviews that they had substantially more due process rights than was actually the case.

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[20] *See* F. Graham, The Self-Inflicted Wound (New York: The Macmillian Company, 1970). The public has relatively little knowledge of what the Court has done; *see, e.g.*, K. Dolbeare, The Public Views the Supreme Court (H. Jacob, ed.) Law and Politics in the Federal Courts (Boston: Little, Brown and Company, 1967). Elites play an important role, then, in shaping public response to Supreme Court decisions.

[21] Possible responses ranged from one to five; in this item responses one and two were combined as very important, three was treated as a neutral response, and four and five were combined as not important. On this item, 33.5 percent thought court interference was not important.

Thus both teachers and students had very muddy impressions of what the Court said in *Goss* and other discipline decisions. Both groups knew, however, that the Court had said *something*. They used their imaginations and random bits and pieces of information to arrive at a conclusion about what the Court had said.

For teachers, these general feelings were combined with the sense that they faced greater likelihood of being sued individually by students and their parents. While no such suits had, in fact, been filed against teachers in recent years in the districts we studied, there was, nevertheless, a strong feeling on the part of teachers that such suits had occurred and might involve them in the future. This feeling of increased personal liability was fed by reports of such suits elsewhere contained in news reports, professional journals and by other law suits involving different educational issues. Bussing cases, "educational malpractice" suits and cases at the college-university level all contributed to the general feeling that the teacher was about to be taken to court.[22]

To sum up, several different influences were found bearing on teachers besides misperceptions about the *Goss* case, including a lack of understanding about what the Court had done in other areas, fear of personal suit and misinformed, rule-breaking students who occasionally threatened teachers with legal action. Not all teachers, of course, held these views, but, as the percentages above indicate, a significant percentage did. For these teachers, a number of behavioral response alternatives were followed, including adoption of a stance ignoring the perceived danger and continuing previous practices associated with discipline. Others, however, indicated in interviews that they now followed a more risk-adverse policy with regard to discipline. These teachers had "back-off" from discipline and indicated that they now stayed in their classroom, rather than circulating in halls, and that they felt discipline was "someone else's job." In short, they reported that they were afraid to discipline students.

It is, of course, possible that Court decisions and fear of being sued are new justifications for an old behavior. It is possible that these teachers never were certain about how to maintain requisite order in their classrooms.[23] The statement by teachers that they were disciplining students less was expressed frequently enough, however, to cast doubt on this interpretation. It remains a possibility, however, that the unintended consequences of *Goss* and other cases is that they provide teachers with a new alibi.

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[22] The case areas with impact on the public schools is large, as detailed by P. Zirkel, *A Checklist Based on Supreme Court Decisions Affecting Education*, 7 NOLPE School L.J. 199 (1977).

The final major unintended consequence of *Goss* is its contribution to the search for "new" penalties, some of which seek to replace out-of-school suspension. While the *Goss* hearing required little effort, some teachers and administrators saw greater risk of court action in using external suspension. For this, among several other reasons, they saw increased merit in the use of in-school suspension rooms. These were present in one of the schools we studied and were in the process of being installed in others. Students were assigned to these windowless rooms for extended periods, sometimes days, and were completely separated from their traditional classes. No record was kept of these assignments for parent, school board, or public supervision. This alternative penalty, designed in part to circumvent *Goss*, contains the potential for raising a significantly greater number of legal, social and educational questions than did those in the original case. Paradoxically, then, the *Goss* case may contribute to subsequent litigation in ways totally unforeseen by the majority in the case, or by early critics of the decision.

The uncertainty about *Goss* and other decisions, especially among teachers and students, can be addressed in part through in-service and continuing education programs and by the incorporation of legal education into the public school and teacher preparation curriculum. School codes may help. But until these and other steps are taken, the unintended consequences of the Court's discipline decisions will continue to be felt and will have a significant, if difficult to measure, impact on what occurs in the public schools.

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[23] This is not a subject covered in most teacher preparation programs, in part because of the difficulty of "teaching" matters that seem related in large measure to style and technique. There did, however, seem to be connection between being a successful teacher in other respects and the ability to maintain classroom order.

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ED 170842

8

Craig v. Alabama University: Reverse Discrimination in Employment and Historical Black Colleges

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Craig v. Alabama State University (ASU)[1] is a lawsuit involving charges of reverse discrimination[2] in employment against a historical black college. Alabama State University at Montgomery was opened in 1866 in Marion, Alabama for the education of "Colored Teachers and Students" and moved to Montgomery, its present location, in 1887. It has an enrollment of about 4,200 students. In 1971, Charles Robert Craig, a 39-year-old white professor was given a one year contract at ASU to teach English; and in 1972 he received a second one year contract. But in December of his second year he was informed that his contract would not be renewed for a third year. Charles Craig felt that the nonrenewal of his contract was due to his race and filed a racial discrimination suit under U.S. Code 42, Sections 1981, 1983, 1985(3); and 2000e, Title VII of the Civil Rights Act of 1964.

Craig won his suit against ASU for himself and all other whites similarly situated. The case seems to be a simple one; yet, it is difficult to analyze: because the lawyers that defended ASU appeared grossly incompetent;[3] the judge went far beyond what was required in effecting a remedy; and ASU did not appeal the case. However, in order to better understand *Craig* it probably makes sense to look at: The Constitution and the use of race, the current position of the black colleges, the case itself, the decree, and the remedy. The discussion of these areas will not be followed in a tight sequential order.

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[1] Civil Action No. 76-21-N, (M.D. Ala. 1978).

[2] Reverse discrimination generally refers to racial discrimination by an organization against a white person or affirmative action programs designed to aid minorities by the use of racial goals or quotas, *re* Bakke v. Regents of the University of California, 46 U.S.L.W. 4896 (U.S. June 28, 1978).

[3] This opinion was based upon information contained in the judge's written opinion, pre-trial and post-trial briefs filed by the plaintiffs. Efforts to obtain defendants' briefs were unsuccessful.

Concerns by white Americans about affirmative action programs designed to speed up the integration of minorities into American's social, educational, business and political organizations have led to charges of reverse discrimination. Many Americans, whites and nonwhites, acknowledge that the notion of merit will by definition always favor the advantaged members of society; however, they also argue that while this is unfortunate, to change or modify the basic rules for gaining upward mobility would be worse for society as a whole. Further, they argue that while it's easy to identify the group that caused minorities to be so disadvantaged, it is almost impossible to identify guilty individuals within that group; and, because the Constitution recognizes individual rights over group rights, all decisions making use of merit for upward mobility must be based upon individual rights.

Of course, the neutrality of the Constitution along racial lines has been used for discriminatory purposes, as illustrated by Justice Marshall's[4] separate opinion in *Bakke.* During the Reconstruction years immediately following the Civil War, many Americans opposed to advancement of the newly freed slaves argued successful through the Courts that the "colorblind" nature of the newly amended Constitution made special programs enacted by Congree to aid the freedom unconstitutional; and over a period of years the U.S. Supreme Court invalidated most of the Reconstruction legislation designed to help the newly freed slaves. However, in another separate opinion in *Bakke* by Justices Brennan, White, Marshall, and Blackmun it is claimed that "no decision of the Court has ever adopted the proposition that the Constitution *must* be colorblind."[5]

While there have been several reverse discrimination suits filed in recent years,[6] *Craig* is the first one involving a historical black college. The black colleges are in the forefront of a movement by HEW to have states with dual systems of higher education desegregate those institutions. In January 1969, HEW requested that those states with dual systems submit desegregation plans within 120 days or less, but very little happened until 1972 when a U.S. District Court in *Adams v. Richardson*[7] ruled that continuation of federal assistance to states that ignored HEW's request for desegregation plans, or submitted plans unacceptable to HEW, violated rights protected by Title VI; and that HEW had a duty to commence enforcement of the law. Those states however, were allowed to revise their plans. In *Adams*, an *amicus curiae* brief was filed by the black colleges asking that the special role played by the black colleges be recognized. The court recognized the special role of black colleges in any statewide desegregation plan. However, prior to *Adams* in 1967 the Supreme Court, in *Wallace v. U.S.*,[8] a suit involving institutions of higher education in Alabama, recognized the need for a comprehensive statewide plan for desegregation. The black colleges, in opposing *Adams* felt that:[9] the burden of dismantling dual segregated school systems and achieving unitary systems has been disproportionately borne by black people; black colleges must preserve and upgrade for black people the unique values which they bring to American education because they have developed and demonstrated their unique ability to deliver higher education to black students who are victims of inferior precollege education, they provide an environment wherein black leadership by faculty and students can develop, they provide an environment free of racial antagonism, they are still the major force in the upward mobility of black people in this country; integrated settings do not preclude discrimination, but in fact may aid in discrimination; and while blacks have no desire to return to separatism they find it imperative that they maintain as much control over the education and socialization of their children as possible. The black colleges enroll only 35 percent of all black college students but graduate 53 percent of all black college graduates in America.[10] That is an outstanding accomplishment.

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[4] Bakke, *supra* note 2, 78-811-Separate(b), at 5.

[5] *Id.* at 12.

[6] *See*, Bakke; DeFunis v. Odegaard, 416 U.S. 312 (1974); McDonald v. Santa Fe Trail Transportation Co., 427 U.S. 273 (1976); Detroit Police Officers Association v. Young, 46 U.S.L.W. 2463, 2464 (E.D. Mich., Feb. 28, 1978); and WRMA Broadcasting Co., Inc. v. Hawthorne, 365 F. Supp. 577 (M.D. Ala. 1973).

In addition to orders by HEW to integrate, black colleges find that in each of the guilty states, state boards of higher education are allowing white public colleges and universities to expand by erecting branch campuses next to black colleges; and ASU is no exception. Since 1967, three predominately white universities have been permitted to build branch campuses in Montgomery. Prior to 1967, ASU was the only public institution of higher education in Montgomery. Efforts to stop that process through the courts have failed.[11] Thus, black colleges find themselves between a "rock and a hard place."

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[7] 480 F.2d 1159 (1973).

[8] 389 U.S. 216 (1967).

[9] McWilliams & Spurgeon, *In Defense of a Black University: FAMU*, Black Colleges and Equal Opportunity in Higher Education, University of Nebraska at Lincoln (1975).

[10] F. Brown & M. Stent, Minority Enrollment in U.S. Institutions of Higher Education (New York: Praeger Publishers (1977).

In 1968, ASU's student body contained 6 white students out of 2,169 and in 1977, there were 19 whites out of 4,212. While all public institutions of higher education are open to white and black students alike, it is evident from those figures that ASU is still favored by black students. Black enrollment in white colleges has risen substantially but white enrollment in black colleges remains almost zero.

THE CASE

Charles Craig was employed at ASU for 2 years, 1971-73, and his contract was not renewed for the 1973-74 school year. On January 20, 1976 about two and a half years later he filed a class action suit charging ASU with reverse discrimination. The district court ruled that the class action was permissible and expanded the class to include whites in all positions, faculty and non-faculty. A motion by the defendants to dismiss the complaint was denied. Such a motion is not unusual in a trial, but this one is unusual because it is about the only challenge the defense made during the court proceedings.

The plaintiffs based their case for proof of discrimination on statistical data as suggested by the U.S. Supreme Court in *Teamsters v. U.S.*[12] The Court in *Teamster* noted that discrimination may be proven by comparing a statistical account of those working with the racial composition of the population from which employees are hired. Plaintiffs argued that they need only show that statistically the white-black employment ratio at ASU did not reflect the white-black population composition in Alabama. The statistics revealed that, starting with 1968, the first year whites were hired; whites represented 2 percent of the total work force and rose to 13 percent 5 years later. At the faculty level the percentage of whites was much higher. Between 1968 and 1973, the percentage of white faculty rose from 5 percent to 28 percent; but remained relatively stable since 1973 at about 28-30 percent of the total faculty. From 1969 to 1971 60 percent of all new faculty hired at ASU were white; and thereafter about 25 percent of the new faculty members have been white. In ASU's recruitment, plaintiffs claimed that this reduction in the hiring of whites is probably fostered by recruitment advertising that promotes ASU's image as a black college. The average white faculty was promoted and received tenure quicker than black faculty, but plaintiffs claimed that white faculty were better qualified in terms of being the holders of terminal degrees which explains the difference. The same argument was made regarding salaries. Plaintiffs felt that they should have been paid higher salaries.

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[11] Alabama State Teachers Association v. Alabama Public School and College Authority, 289 F. Supp. 784 (M.D. Ala. 1968); *aff'd per curiam*, 393 U.S. 400 (1969); Sanders v. Ellington, 288 F. Supp. 937 (M.D. Tenn. 1968).

[12] 431 U.S. 324, 349 N.20 (1976).

The defendant, ASU, argued that simple mathematics would explain that the percentage of new white hires would decline even if they hired the same number each year; and that as a historical black institution it had an obligation to act affirmatively in hiring black faculty; that while its white faculty was only about 30 percent, no white public college or university in Alabama had more than 2 percent black faculty and almost no black administrators; and that while it acted affirmatively in hiring black faculty, once hired white faculty were treated the same as black faculty.

U.S. District Judge Frank M. Johnson, Jr. ruled that for the trial, each of the 'class witnesses' was a white person, and was a former or present member of the faculty of ASU; and each had suffered some kind of employment disappointment at ASU; and that those employment disappointments were the product of racial discrimination on the part of ASU. The court found the testimony of Charles Craig and class members "credible and particularly compelling"; and found the testimony of ASU president Dr. Levi Watkins not credible; and also concluded that Dr. Watkins ran ASU like an "administrative tyrant."

The court ordered the university to stop discriminating against whites in the hiring of administrative, teaching, clerical and support staff; in promotion and tenure of faculty; and in all other aspects of employment practices; and to pay the plaintiffs a reasonable attorney's fee. This order was issued on May 1, 1978. A hearing was held on July 19, 1978 to determine relief for plaintiff's class and on November 15, 1978, and each 6 months thereafter, the university must file a compliance report with the court.

In September 1978 the university agreed to pay $208,900 in back pay and damages to be shared by 45 whites, several former and present faculty members and others who have applied for positions at the university. A motion for additional relief was filed in October, 1978 claiming that the university is continuing its policy of discriminating against whites. The contracts of two white faculty members have not been renewed and a new salary schedule has been adopted to compensate faculty members based upon length of service at the university. Plaintiffs claim that most whites were not hired until 1970.[13]

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[13] *Injunction Against ASU Sought*, Montgomery Advertiser, Friday, Oct. 20, 1978 at 10.

Meanwhile, university alumni have asked the university's Board of Trustees to keep the president under control.[14]

THE CLIMATE DURING THE TRIAL

The political climate during the trial must have had some influence on the court's proceedings, and the presentation of the case by the plaintiffs and defendants. The *Bakke* reverse discrimination case was still before the U.S. Supreme Court and it seemed certain to many that the use of race in hiring would be declared unconstitutional. The plaintiff sensed this mood and filed a suit almost three years after he had been informed that his contract would not be renewed. The defendants also sensed this mood surrounding *Bakke* and put up almost no defense. The judge sensing this mood issued an order that went far beyond what one would have expected. Further, it seemed evident that the university's president had the approval of the university's Board of Trustees to keep the overall percentage of white faculty at about 30 percent and also, not to put too much energy into challenging the plaintiffs' charges of reverse discrimination. In order to get a feel as to how the case should have been argued, it's probably best to take a look at what the defendant, ASU should have done.

Did Charles Craig have standing before the court? Craig filed his charges under 42 U.S.C., section 1983. However, the U.S. Supreme Court in *Roth*[15] and *Sinderman*[16] held that a nontenured professor is not even due a formal hearing by a University as to why his/her contract was not renewed, and in order to get a hearing a liberty or property interest must be involved. Craig did not have tenure or a term contract; nor was it ever suggested that termination made it impossible for him to get future employment as a professor. The Supreme Court's ruling in *Roth* suggested that Judge Johnson could have ordered the university to grant Craig a formal hearing in order to challenge his dismissal; and even if Craig would have lost such an appeal, the U.S. Supreme Court's holdings in *Bakke*, *Sweeny*,[17] *Keyishian*,[18] *Sweezy*,[19] and *Horowitz*[20] states that courts should leave such academic matters with university authorities. The defense could have argued that section 1983 applied only if a liberty or property interest was at stake.

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[14] *ASU Alumni Protest Trustees*, Montgomery Advertiser-Journal, Oct. 21, 1978.

[15] Roth v. Board of Regents, 408 U.S. 564 (1972).

[16] Sinderman v. Perry, 408 U.S. 593 (1972).

[17] Sweeny v. Keene State College, 39 S. Ct. Bull. B 138 (CEH).

[18] Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967).

[19] Sweezy v. New Hampshire, 354 U.S. 234, 263 (1957).

[20] Horowitz v. Board of Curators of Univ. of Missouri, 538 F.2d 1117 (1976); 430 U.S. 964 (1977).

Craig was employed at four different colleges within 11 years before joining ASU's faculty; and while he had a Ph.D. degree it was not awarded until 1971, the year he was employed at ASU. The plaintiff's attorney used this diversity of experience as a plus, however, it could have been viewed as negative. The plaintiffs' attorneys also claimed that Craig's dismissal must have been racially motivated because he was rated competent by his superiors. However, the Supreme Court has made it clear that universities have the right not to renew the contract of a nontenured employee without a hearing or explanation, and that the competence of an employee is irrelevant. The question as to whether or not a black professor in Craig's position would have been dismissed seemed like a task beyond the ability of the court to determine. Craig's standing was indeed questionable.

Did Craig constitute a class? If so, what class? Craig, a faculty member filed a class action suit for all whites in all possible positions at ASU, faculty administrative, clerical and support staff. Craig initiated the suit alone, but during the trial he was joined by seven other white faculty members, but not by whites in non-faculty positions. There is no evidence that the defendants challenged the limits of this class before or during the trial. The defendants did, however, challenge whether or not this should be a class action suit but they did not challenge the definition of the class which was just as important. The hiring of faculty is different from hiring clerks and support staff. Judge Johnson noted in his opinion[21] that at the time of the trial no definition of plaintiff class had been advanced, but went on to define the class as:

> (1) all past, present, and future white employees of ASU, (2) all white persons who have applied or who will apply for employment at ASU, and (3) all white persons who would have applied for employment at ASU but for the University's discriminatory practices.

This definition of a class is unusually broad, given that only faculty members were involved in the litigation. How would one determine, for example, what whites might have applied to ASU for employment but did not because they felt that they would not get the job? Generally, the Courts have held that before a person may charge an organization with discrimination in hiring, that person must have applied for employment with that organization and been refused. If individuals appeared before the court making claims that they did not apply for employment at ASU because they felt that they would have been refused employment because of their race, what relief would be granted?

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[21] Craig, *supra* note 1.

Needless to say, such a definition of plaintiffs' class is too broad and would seem certain to have been reversed on appeal, but defendants did not appeal the case. A proper definition of the plaintiff's class should have been white faculty terminated at ASU because of their race. Even with this limited definition of plaintiff's class a determination of relief for class members would be difficult, because it's one thing to show statistically that whites as a class were discriminated against; but it's almost impossible for a court to determine whether or not a particular professor was not hired, not promoted on time, or had his/her contract terminated because of race. That's an academic decision to be made only by academicians. Federal Rules of Civil Procedures give three basic conditions for granting class action: (1) the class must be numerous, (2) the question of law must be common to all members of the class, and (3) the claims must be typical of the entire class. Plaintiffs' pre-trial brief contained only Craig's name, however, their post-trial brief contained the names of several other white faculty. The question of the law regarding faculty hiring does not appear to be common with that for hiring non-faculty; and Craig does not seem to be typical of the entire class.

Should Craig have been granted strict judicial scrutiny of the evidence? He was not a member of a "suspect" class, nor was there a "fundamental" interest involved. In other words, he was not a member of a racial or ethnic minority group, nor was employment at ASU considered a constitutional right. While the U.S. Supreme Court in *Bakke* held that racial distinctions of any sort are to be suspect and call for the most exacting examination, there was enough evidence based upon Supreme Court rulings prior to *Bakke* that strongly suggested that racial classification alone was not sufficient to grant strict scrutiny of the evidence. Who should have carried the burden of proof, Craig or the university? The court granted Craig strict scrutiny of the evidence without a challenge from the defendants. In a post-*Bakke* case, *Sweeny v. Keene State College*, a female faculty member charged the college with sex discrimination in hiring and promotion. She won her case in the lower courts but on appeal, the Supreme Court held that although courts may require employees to articulate a nondiscriminatory reason for their actions, employers may not be compelled to prove the actions were not intended to discriminate. The college argued that it would be open to court inquiries for every unsuccessful and disgruntled candidate as to why the unsuccessful was not as well qualified as the successful candidate. It was important for the defendants to challenge the granting of strict scrutiny in order for it to be considered on appeal, witness the *Bakke* case. Bakke lacked standing, but because the

University of California did not challenge his standing in the lower courts the Supreme Court refused to hear such a challenge before it.

Did ASU have a valid reason for maintaining a black-white faculty ratio of about 70-30? In order for race-conscious hiring to be legal under the Constitution, the university must have been able to show that this was necessary to accomplish its purpose or to safeguard its interest.[22] During the trial the President of ASU stated that he was under pressure from the black community (alumni, students, and faculty) to hold the line on hiring white faculty, and that he felt it was necessary to carry out the mission of a historical black college with a nearly 100 percent black enrollment. However, the plaintiffs claimed that the U.S. Supreme Court in *McDonnell Douglas v. Green*[23] and *Teamsters v. the U.S.*[24] ruled that Title VII tolerates no race-conscious remedies in hiring. Judge Johnson agreed with the plaintiffs' claim. But four justices of the Supreme Court who reviewed their holdings in *McDonnell Douglas* and *Teamsters* almost at the same time this trial was in process came up with a different interpretation. Justices Brennan, Marshall, White, and Blackmun in their separate opinion in *Bakke* held that *McDonnell Douglas* and *Teamsters* recognized that Title VII permitted race-conscious remedies in hiring. Also, Justice Powell, speaking for the majority opinion in *Bakke*, cited *McDonnell Douglas* and *Griggs v. Duke Power Company*[25] as evidence that proof of a "disparate impact" under Title VII alone is not sufficient to establish a violation of the statute.[26] The defendants erred in not challenging plaintiff's interpretations of *McDonnell Douglas* and *Teamsters*.

The uniqueness of educational mission of the black colleges has been recognized by the federal government. The courts in *Adams*[27] and *Wallace*[28] also recognized the unique mission of the black colleges, and stated that any plan for integrating higher education must be accomplished by statewide planning. Also, in this regard, Justice Powell speaking for the majority in *Bakke*, stated in the strongest language possible that race-conscious measures designed to enhance educational goals are constitutionally permissible for institutions of higher education.[29] Citing prior court decisions in *Sweezy* and *Keyishian*, Justice Powell stated that the university's right to determine who may teach

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[22] Bakke, *supra* note 2 at 36.
[23] 411 U.S. 792 (1973).
[24] 431 U.S. 324 (1977).
[25] 401 U.S. 424 (1971).
[26] Bakke, *supra* note 2 at 39.
[27] 480 F.2d 1159, (D.C. Cir. 1973).
[28] Wallace v. United States, 389 U.S. 215 (1967).
[29] Bakke, *supra* note 2 at 42.

(also what may be taught, how it must be taught, and who will be admitted to study) is essential to academic freedom and the protection of First Amendment rights.[30] It seems evident that ASU should have contested plaintiffs' claim that prior Supreme Court decisions barred race-conscious hiring remedies in this special situation and that any order to integrate its faculty must be joined with a statewide plan.

THE STATISTICAL CASE

The plaintiffs claimed that, according to *Teamsters*, statistics showing a pattern of disparate treatment in employment was sufficient to show a violation of Title VII. However, as noted earlier by the Court's own interpretation of *Teamsters* the plaintiff's assertions are not entirely correct. The defendants should have made a more determined effort to challenge the plaintiffs' claim on the use of statistical evidence.

The Remedy

The court granted monetary relief to all whites who might have applied for employment at ASU, white faculty who may have lost money due to employment termination after leaving ASU, salary increases for white faculty paid below the average for black faculty at the same rank, and a mandate for ASU to bring its white employment in line to reflect the black-white ratio in the general population composition in Alabama. That ratio would be 70 percent white and 30 percent black instead of the now 30 percent white and 70 percent black. The court's decision seemed clearly out of line with the U.S. Supreme Court's rulings involving race-conscious remedies where such actions can be justified with an educational rationale, and the fact that the university was guilty is not sufficient to grant relief. The university felt that it had acted affirmatively in bringing its white faculty up to about 30 percent within 5 years while white public colleges and universities in Alabama employed very few black faculty members, and given its special mission as a historical black college it had an obligation to act affirmatively in maintaining a substantial black faculty presence. Therefore, a reasonable ruling would have been to limit the plaintiff's class to white faculty members terminated by the university due to their race, order the university to stop discriminating against white faculty employed, order the State of Alabama to produce a comprehensive statewide plan to bring the faculty composition of all of its public institutions of higher education in line with the black-white ratio in the general population, and order the historical black colleges to draft a race-conscious faculty hiring plan based upon their special mission and needs.

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[30] *Id.* at 43.

The court recognized the university's claim that it should not be required to hire large numbers of white faculty while white public colleges had no such requirements, but the court held that just because white colleges were guilty of discrimination it did not justify ASU doing so. Even though the court relied upon an earlier Supreme Court decision in *Wallace v. U.S.* which held that Alabama should develop a comprehensive statewide plan to integrate its institutions of higher education to justify a starting date of racial discrimination by ASU, the court did not find it necessary to ask the State to develop and implement such a plan suggested in *Wallace;* but, instead, limited its remedy to ASU, one historical black college. The court's remedy seem clearly out of line with guidelines suggested by recent rulings by the U.S. Supreme Court.

THE CLIMATE SURROUNDING CRAIG

There is hardly anyone familiar with *de jure* segregated school systems in the South that can accuse U.S. District Judge Frank M. Johnson, Jr. of not being firm in his stand against racial segregation. Rulings by his court to outlaw segregation in all aspects of public life in the South are legend. However, as life would have it, circumstances surrounding this case were unusual. First, the *Bakke* reverse discrimination case was still pending before the U.S. Supreme Court and it appeared certain that race-conscious remedies would be declared unconstitutional. The decision in this case was rendered one month before the *Bakke* decision. Second, Judge Johnson became ill during much of the time the trial was in process. His written opinion lacked the depth of legal analysis usually associated with him over the years. His opinion was almost a mirror of the plaintiffs' briefs, which were also lacking in scholarly legal analysis. Third, the defendants did little to challenge the plaintiffs' complaints, leaving the judge to rely too much on the plaintiffs' legal research and arguments. However, in fairness to the judge, it is not his role to assist defendants in a court of law. Fourth, the judge became obsessed with the personality of the university's president which may have obscured the real issue in the case, the right of a historical black college to act affirmatively in hiring black faculty. Contrary to evidence before the court, the president in his testimony gave repeated denials of wrong doing, and blamed much of what happened on his subordinates; and when pressed by plaintiffs' attorneys for explanations of his behavior in hiring matters he gave none. The judge labeled the president an "administration tyrant" (autocratic in his decision-making), a conclusion which most blacks associated with the university drew long before the first white faculty member was hired, and it seemed the judge, who is also a long-time resident of the area, was aware of the president's behavior before the trial. On the other hand, it is also apparent that black students who enrolled in the university did so with the understanding and expectation that there would be a substantial black presence on the faculty. Also, the increase in white faculty did not result in an increase in the percentage of white student enrollment. Fifth, Judge Johnson's remedies in aiding the integration of elementary and secondary schools seem not to be applicable to post-secondary schools because: (1) elementary and secondary schooling is mandated while post-secondary is voluntary; and (2) curricula differences in public higher education make it impossible to assign students to schools by their residence.[31] Regarding integration of public higher education in Alabama, blacks went to court[32] seeking to integrate ASU by preventing the State of Alabama from allowing a white university from constructing a branch campus in Montgomery, which they felt would compete with ASU for white students. The court in *Alabama State Teachers v. Alabama* held that while the state had a duty to dismantle its dual system of public higher education, any requirement beyond freedom of choice is in violation of the 14th Amendment. The defendants in *Craig* should have asked the court to review *Wallace* which cited the need for a comprehensive statewide plan for desegregation; *Alabama State Teachers v. Alabama* which sought to prevent white colleges from expanding next to ASU in light of ASU's inability to attract white students even with a sizeable white faculty; and to review the court's concerns in *Adams* that recognized that desegregation colleges differed significantly from those of elementary and secondary schools and that any statewide plan should take into account the special problems of the black colleges. In *Craig*, the judge failed to recognize the need for statewide action in integrating college faculties and the special needs of black colleges. Sixth, during the trial Judge Johnson was nominated by the President of the United States to become the next Director of the Federal Bureau of Investigation (FBI). Even though, he later withdrew his name from consideration because of illness. One can only speculate as to how much of the judge was a politician and how much he was still a judge during that period of time. Needless to say, however, a controversial decision supporting ASU in this case which preceded *Bakke* would not have enhanced his confirmation before the U.S. Senate.

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[31] Rentschler, *Integrating Higher Education in North Carolina*, 7 NOLPE School L.-J. 1 (1977).

[32] Alabama State Teachers v. Alabama Public School and College Authority, 289 F. Supp. 784, (M.D. Ala. 1968); *aff'd per curiam*, 393 U.S. 400 (1969).

Whether his pending confirmation impacted on his decision in *Craig* cannot be determined, but the situation did exist. The *Craig* case reminds us of the slave folktale about the goose and the fox. In the tale

> Brother Fox caught Brother Goose and accused him of stealing his meat. When the goose protested that he did not even eat meat, the fox answered that the judge and jury would settle the dispute. Brother Goose, however, learned that the judge and jury were all foxes and concluded that his goose was cooked.[33]

It seemed evident that Charles Craig should not have been granted standing by the court. U.S. Supreme Court rulings in *Roth*, *Horowitz*, *Bakke*, and *Sweeny* all suggest that Craig should not have been denied standing. Accepting the fact that the plaintiff was granted standing, the defense proved to be woefully incompetent to handle a case of such great significance. The court went far beyond what one would have expected in fashioning a remedy, it failed to recognize the special mission of historical black colleges, and gave a narrow interpretation of the state's role in dismantling dual systems of public higher education. The sole responsibility for integrating the faculties of public higher education in Alabama should not rest with one black college, but with the entire system of higher education. On appeal, if the case can still be appealed to a higher court, it seems certain that, given the interpretations of five justices of the U.S. Supreme Court in *Bakke*, that ASU, a historical black college (short of a statewide plan on such matters) would be allowed to consider race in the hiring of faculty. On the other hand, if *Craig* is fully implemented it would mean the death of historical black colleges.

In a case where the pre-trial brief filed by the plaintiff included only one white faculty member as complainant, but the class was expanded to all university positions; where the court could not find proof that any of the individual plaintiffs[34] had been discriminated against, but concluded that collectively statistical evidence demonstrated a pattern of racial discrimination against whites; where the court concluded that the administrative style of the University's President was that of a tyrant in which both blacks and whites fell victims (to arbitrary action if anyone displeased him) but termed this behavior racist when applied to white faculty; where individual relief was awarded even though the court admitted the acts of racism against individual faculty could not be determined; where an individual college was singled out to rid a statewide system of racial segregation; where the defendants failed to challenge important legal claims made by plaintiffs makes this case an unusual one in the history of civil rights litigation in America. The sad part about the outcome in *Craig* is that the people—students, faculty, alumni, and interested citizens—who believe that the historical black colleges have a unique mission in higher education (and that because of this unique mission black colleges have an obligation to act affirmative in hiring black faculty) have to suffer because ASU's adminsitration[35] refused to adequately defend the college's position.

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[33] Hughes, *Equality in Fact v. Equality of Opportunity*, 23 Wayne Law Rev. 4 (July, 1977). *Also see:* C. Lawrence, *When the Defendants are Foxes Too: The Need for Intervention by Minorities in "Reverse Discrimination" Suits Like Bakke*, 1 National Law Guild J. 34 (1976).

[34] Once class action was granted, several other white faculty members were added as class members.

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[35] Administration here refers to the University's President and its Board of Trustees.

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Reduction in Force: Legal Implications

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Those of you who have experienced a reduction in force (RIF) or have examined this usually distasteful activity realize the complexity of the topic—particularly its legal implications. The approach I have taken is to equate "legal implications" with legal issues which appear in recent litigation *and* whatever generalizations emerge from the decisions.

Before considering legal implications, however, we should at least summarize the major factors necessitating reduction-in-force decisions. Sometimes overlooked in the literature are RIF actions of the 1960's. At that time court-mandated desegregation produced a surplus of personnel in many districts that formerly maintained dual systems. Cases growing out of this situation are still in the courts.

As the products of the post World War II "baby boom" moved from the school in the present decade, schools throughout the country began to be affected by declining enrollment.[1] Obviously when the student population of a district continues to decrease, eventually a teacher surplus occurs. Also, since state funding is typically provided on a per pupil basis, districts with declining enrollments are allocated proportionately less money for operation.

At the same time, budget reductions are resulting from the so-called "tax payers' revolt". The defeat of school tax levy proposals is illustrative. However, a more dramatic and far-reaching expression is voter approval of Proposition 13 in California and similar property tax cut provisions in other states.

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[1] *See* S. Neill and J. Curtis, AASA Critical Issues Report, Staff Dismissal: Problems and Solutions 1978 at 58 listing National Center for Education Statistics projecting enrollment declines through 1985.

Finally, school districts, including those with reduced revenues, must cope with the ever-increasing costs produced by economic inflation. Because employee salaries represent the greater portion of a school's operating budget, the only feasible alternative is likely to be a reduction in force.

The recent litigation stemming from RIF actions falls roughly into three broad categories according to the sources of law to which the courts directed attention.

Using these categories as a basis for organizing the discussion, we will examine first those cases in which constitutional questions were raised; next we will look very cautiously at the largest and still growing body of decisions turning on the construction of specific state statutes; finally, we will consider those cases in which contract provisions (individual and master contracts) were pertinent to the rulings.

CONSTITUTIONAL ISSUES

Racial Discrimination

In RIF situations, the courts in the Fifth Circuit make frequent use of the criteria enunciated in *Singleton v. Jackson Municipal Separate School District.*[2] According to the *Singleton* criteria, school districts under court ordered desegregation are obligated to develop objective, non-discriminating standards prior to making staff reductions.

In *Ayers v. Western Line Consolidated School District,*[3] the Fifth Circuit Court reviewed claims by employees that they were not rehired in violation of their First and Fourteenth Amendment rights and *Singleton* standards. The number of counselors in the district had been reduced from three to one, and one plaintiff's position had been abolished. Although the court rejected the constitutional rights claim, it remanded the case to the lower court to determine whether the reduction in positions was related to desegregation. (We should note that the Supreme Court has granted certiorari on the basis of one of the teachers' First Amendment claim.)[4]

The National Education Association sued the Selma, Alabama school board in 1970, charging that it had demoted and dismissed black employees in violation of *Singleton* requirements. Two years later, the board attempted to formulate acceptable standards but the district court in 1975 rejected them as being in part subjective. One of the employees, a former principal of the all black high school, was appointed junior high school principal in 1970 and remained in that position until 1977. A principalship opened in 1975 but the board did not promote him.

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[2] 419 F.2d 1211 (5th Cir. 1969) *cert. denied*, 396 U.S. 1032 (1970).

[3] 555 F.2d 1309 (5th Cir. 1977).

[4] Givhans v. Western Line Consol. School Dist., *cert. granted*, 46 U.S.L.W. 3616 (U.S. April 4, 1978).

In a 1976 ruling on the 1970 complaint, the district court found *Singleton* violations and ordered this employee be assigned as principal with back pay for one year. On appeal, the Fifth Circuit Court modified the award to include back pay from the time of the initial transfer. The court indicated that "*Singleton* standards require a board to chose definite principles that it will employ in staff reductions and make the principles publically known . . . and then apply the principles if reductions occur . . . ."[5]

The Fourth Circuit Court imposed the equivalent of *Singleton* standards in ruling on a civil rights action also brought by a demoted and discharged black principal.[6] The court said:

> . . . [A] school system cannot displace black faculty merely because the black schools are closed or integrated as a part of a plan for desegregation. If the plan reduces the number of positions, the school system must consider all the faculty on the basis of *objective, racially neutral criteria* for the remaining positions.[7]

The court ordered the board to consider the plaintiff's immediate reinstatement to a principalship. However, if the employee was found to be less qualified than other employees of the district who were candidates, he was to be placed in the next vacant principalship.

Other Alleged Violations

Attempts to use RIF to remove unwanted employees can result in infringement of both procedural and substantive constitution rights. In a complaint[8] filed against Eastern New Mexico University last year, three employees who were released charged that the procedures used violated the board policies published in the Faculty Handbook. They further alleged in their § 1983 complaint a deprivation of Fourteenth Amendment due process rights, noting encroachment on property and liberty interests and requesting reinstatement and monetary damages.

The alleged policy violations were listed as:

(1) ENMU failed to demonstrate the necessity for the RIF action.

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[5] Lee v. Selma City School Sys., 552 F.2d 1084, 1086 (5th Cir. 1977).

[6] Reynolds v. Abbeville Cty. School Dist. No. 60, 554 F.2d 638 (4th Cir. 1977).

[7] *Id.* at 642.

[8] This complaint was filed in the district court of Sante Fe County, New Mexico. For a final decision on a college level RIF action *see e.g.* Browzin v. Catholic University of America, 527 F.2d 843 (D.C. Cir. 1975).

(2) The administration, rather than the RIF committee, determined the necessity for such action.
(3) Required justification procedures for the individuals affected were not followed.
(4) Individuals were not chosen in consultation with school or division directors.
(5) RIF guidelines giving major consideration to tenure and seniority *regardless* of program were ignored.

In fairness to the institution, I should say that I did not see its response and there has been no adjudication of the complaint. However, in an out-of-court settlement, one of the employees was reinstated and paid $10,000 damages.

Last year in *Unified School District No. 480 v. Epperson,*[9] the Tenth Circuit Court considered the appeal of two teachers whose contracts were not renewed due to "budgetary cuts necessitated by a decrease in school enrollment with a corresponding decrease in state aid." The teachers claimed that the actual reason for their dismissal was their activities in the Kansas National Education Association. Although the trial court found no First Amendment violations, it did agree that the teachers had a property interest which gave each a right to a hearing. The appellate court affirmed this determination but held that the lower court erred in not granting monetary damages. On appeal to the United States Supreme Court, the judgment was vacated[10], based upon *Mt. Healthy*[11] and *Carey*.[12]

STATUTORY ISSUES

As one would anticipate, most of the RIF litigation falls within this grouping. There are specific statutory provisions pertaining to layoff of personnel in some states; in others a RIF action must be implemented within the legal framework of nonrenewal and dismissal. Collective bargaining statutes may also represent an important consideration in certain states.

The most common element in RIF statutes is a statement of criteria for the selection of employees to be released. Most of these provide for the layoff of nontenured before tenured employees. Perhaps the greatest differences are found in the relative weightings accorded seniority and merit. Missouri statutes provide a fitting example. The statute applicable to metropolitan school districts indicates:

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[9] 551 F.2d 254 (10th Cir. 1977).
[10] Unified School District No. 480 v. Epperson, 460 U.S.L.W. 3611 (U.S. 1978).
[11] Mt. Healthy Community School District v. Doyle, 429 U.S. 274 (1977).
[12] Carey v. Piphus, 98 S. Ct. 1042 (1978).

> Whenever it is necessary to decrease the number of employees because of insufficient funds or decrease in enrollment or lack of work the board of education may cause the necessary number of employees, beginning with those serving probationary periods, to be placed on leave of absence without pay, but only in *inverse order of their appointment* . . . (Emphasis added).[13]

Contrast this to the provisions covering all other classes of districts in the state:

> In placing teachers on leave, the board of education shall be governed by the following provisions: (1) No permanent teacher shall be placed on leave of absence while probationary teachers are retained in positions for which a permanent teacher is *qualified*; (2) Permanent teachers shall be retained on the basis of *merit* within the field of specialization . . . (Emphasis added).[14]

Other elements occurring with some frequency within RIF statutes are designation of due process rights and provisions concerning call back.

With these observations in mind, it is not too difficult to anticipate the types of disputes that have and are continuing to come before the courts. Most of the litigation concerns one or more of the following issues: (1) seniority and tenure; (2) legal implications; (3) hearing rights; (4) sufficiency of evidence warranting the action; and (5) call back rights.

Seniority and Tenure

Where a state statute requires primary emphasis be accorded to tenure and seniority in designating employees to be released, disputes frequently arise as to the affected individual's status.

In New York, a teacher employed as an instrumental music supervisor maintained that the board incorrectly placed instrumental and vocal music in separate tenure areas. Thus, when his position was abolished, his seniority entitled him to the vocal music supervisor's position. The courts held that the board had acted within its authority.[15] An appellate court also refused to order a school board to award seniority credit to part-time teachers since the teachers were part-time of their own accord.[16] Another appellate court ruled that the trial court erred in holding a teacher's action to gain seniority credit moot because she accepted another position in the district.[17] The teacher claimed the board wrongly released her from her previous position because it gave her no credit for two years she served as a reading consultant.

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[13] Mo. Rev. Stat. § 168.291.

[14] Mo. Rev. Stat. § 168.124.

[15] Chazenoff v. Board of Educ. of City School Dist., 58 A.D.2d 1002, 397 N.Y.S.2d 37 (1977).

In other New York decisions, the courts held that seniority credit had been illegally denied. Reversing a lower court judgment, the appellate court ruled that, in a layoff situation, teachers were entitled to seniority credit for continuous substitute service.[18] Similarly, the appellate court sustained a Commissioner of Education decision that a board had released the wrong principal.[19] With a change in state law two principals attained tenure at the same time. The Commissioner had ruled that the selection should have been made on the basis of total service including time that they served prior to the time they became eligible to gain tenure status. Finally, the appellate court held that equitable estoppel prevented a board from asserting that its prior grant of tenure to a teacher was invalid.[20] The court ordered the board to compute seniority from the time of fulltime employment and awarded back pay from the time of discharge.

Legal Qualifications

Quite often seniority issues can be resolved only after a determination is made of the employee's "legal qualification" to fill the position claimed. Oregon statutes, for example, do not permit school boards to retain teachers lacking legal qualification and less seniority.[21] These provisions apply specifically to situations in which courses and positions are eliminated due to declining enrollment.

The most frequently used standard by which legal qualification is assessed is certification. In two instances, the California courts reviewed termination of teachers who gained seniority over retained employees by acquiring certification after the RIF action had commenced. The appellate court held in the first instance that since the plaintiff acquired certification after the position was legally abolished, the board was not obligated to reconsider the matter.[22] However, in the other case the court held for the teacher who had acquired the certification before the end of the school term.[23] The board argued that it was not obligated to employ the teacher for openings that were to occur the following fall. The court disagreed saying that the statutes gave the teacher seniority protection until her employment actually ceased and that the vacancies were announced during that time.

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[16] Reisinger v. Board of Educ. of Yonkers School Dist., 57 A.D.2d 868, 394 N.Y.S.2d 245 (1977).

[17] Neer v. Board of Educ. of Union Free School Dist. No. 22, Farmingdale, 57 A.D.2d 963, 395 N.Y.S.2d 66 (1977).

[18] Axel v. Board of Educ. of New York City School Dist., 56 A.D.2d 598, 391 N.Y.S.2d 457 (1977).

[19] Board of Educ. of Roslyn Union Free School Dist. v. Nyquist, 90 Misc. 2d 955, 396 N.Y.S.2d 567 (Sup. Ct. 1977).

[20] Moritz v. Board of Educ., Growanda Cent. School Dist., 60 A.D.2d 161, 400 N.Y.S.2d 247 (1977).

[21] Cooper v. Fair Dismissal Appeals Bd., 570 P.2d 1005 (Ore. App. 1977).

The question of legal qualification also arises when the teacher's certification is for subjects or grades in which only a parttime position remains. A board in New York faced the problem of having on its faculty a tenured teacher certified only in Latin and French with only a half-time French teaching position available. After the teacher refused the part-time assignment, the board assigned the teacher to a position for which he lacked certification. The court held that the board could not then remove the teacher for not being legally qualified.[24] An Illinois board faced a similar situation when it released a tenured home economics teacher along with three other teachers. The following fall the board employed two new teachers—one whose assignment was half-time home economics/half-time library, the other full-time elementary reading. Because the plaintiff held certification for grades six through twelve, the court ordered that she be considered for one of the positions.[25] In both cases, the dissent maintained that the majority had not given sufficient attention to the teacher's lack of qualification and that the board had met its legal obligation.

This year the Illinois court did move toward accepting the position expressed in the dissenting opinion when it considered a released tenured teacher's claim to a job held by a nontenured teacher.[26] Although the plaintiff had certification as an elementary teacher, the board argued that he was not *legally qualified* for this position. This argument was based on a state department of education regulation specifying the number of hours' credit a teacher must have completed in order to teach certain subjects in a departmentalized elementary school. The court sustained the validity of the regulation and held that legal qualification to hold the position was controlled by it.

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[22] Degener v. Governing Bd. of Wiseburn School Dist., 67 Cal. App. 3d 689, 136 Cal. Rptr. 801 (1977).

[23] Wellbaum v. Oakland Joint High School Dist., 70 Cal. App. 3d 93, 138 Cal. Rptr. 553 (1977).

[24] Chambers v. Board of Educ., Lesbon Cent. School Dist., 58 A.D.2d 961, 397 N.Y.S.2d 436 (1977).

[25] Relph v. Board of Educ., 51 Ill. App. 3d 1036, 366 N.E.2d 1125 (1977).

[26] Lenard v. Board of Educ. of Fairfield School Dist., 57 Ill. App. 3d 853, 373 N.E.2d 477 (1978).

Notice and Hearing

As we have noted the Fourteenth Amendment right to due process in a RIF situation exists when the employees can establish a property interest in continued employment.[27] In some states, there is also a statutory right to notice and hearing. Under Pennsylvania law a hearing is required for tenured teachers whenever "personal or property" rights are affected.[28] The purpose of such hearing is to assure that the reasons for suspension or dismissal fall within statutory grounds and statutory procedures are followed.[29] On the other hand, employees who have no enforceable expectation of continued employment which has been guaranteed by contract or statute have no right to a hearing.[30]

A Pennsylvania board acted illegally in laying off an elementary guidance counselor becaue it failed to provide a hearing. The court said that the *Public School Code*, which provided that such employees shall not be dismissed unless rated unsatisfactory, created an "enforceable expectancy of continued employment."[31]

In Massachusetts, program reductions that led to the elimination of four school counselors' positions were imposed illegally. The appellate court held that since statutory procedures for dismissing personnel were not followed, the employees were entitled to damages and attorney fees.[32]

Also, the Mississippi Supreme Court ordered the re-employment of a drug education teacher whose position had been abolished.[33] The board had failed to provide notice as required by statute.

Finally, a Nebraska school board complied with a trial court order to reinstate teachers it had released in a RIF action. However, the board filed a letter of reservation of rights pending its appeal. Subsequently, because of the state supreme court ruling in a related case,[34] the board asked for a rehearing which the trial court denied. On appeal, the supreme court found for the board.[35] The court said that the board's action in complying with the initial lower court order gave the teachers no additional rights to continued employment and that they were appropriately released.

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[27] Unified School Dist. No. 480, *supra* note 9.

[28] Kodish v. Springford-Ford Area School Dist., __ Pa. Commw. __, 373 A.2d 124 (1977).

[29] Berger v. School Dist. of City of Erie, __ Pa. Commw. __, 373 A.2d 124 (1977).

[30] Fatscher v. Board of School Dirs., __ Pa. Commw. __, 367 A.2d 1130 (1977). *See also* Sergi v. School Dist. of City of Pittsburg, __ Pa. Commw. __, 368 A.2d 1359 (1977).

[31] Dicello v. Board of Dirs. of Riverside School Dist., __ Pa. Commw. __, 380 A.2d 944 (1977).

[32] Nutter v. School Comm. of Lowell, 359 N.E.2d 962 (Mass. App. 1977).

[33] Jackson v. Board of Educ. of Oktibbeha Cty., 349 So. 2d 550 (Miss. 1977).

[34] Alexander v. School Dist. No. 17 of Thurston City, 197 Neb. 231, 248 N.W.2d 33 (1977).

[35] Marksbury v. Board of Educ. of School Dist. of Winnebago, 199 Neb. 283, 258 N.W.2d 242 (1977).

Sufficiency of Evidence

The courts have in some instances dealt with the sufficiency of evidence supporting the board's RIF decision. In Pennsylvania, in response to employee charges that their layoffs were unwarranted, the court conluded that a drop of 476 students in five years and 661 in six years is a "substantial" decline within the meaning of the statute.[36] Another district in the state was also able to establish that staff reduction were justified by a "substantial" enrollment drop.[37]

A Connecticut school district employee whose position as reading supervisor was abolished was unsuccessful in her attempt to establish that the board had acted arbitrarily. The court found no abuse of discretion by the board in eliminating the position and assigning the employee to another position nor in refusing to hear testimony concerning the need for retaining the position of reading supervisor.[38]

A Missouri court of appeal construed the statute quoted previously[39] to permit probationary and permanent teachers to be placed on leave of absence if the school board finds such action "necessary". This case was brought by three probationary teachers whose contracts were renewed in April and who, along with seven other teachers, were placed on leave the following June. The teachers claimed that the action was unnecessary and exceeded the board's authority. The court disagreed. In affirming the trial court's judgment for the board, the court said, "the trial court may not substitute its discretion for discretion legally vested in the School Board." Nothing in the record indicated that the board acted arbitrarily or in excess of authority in releasing the teachers for "further erosion of expected sources of revenue."

In California, the courts ruled that a school board acted legally in laying off employees and reducing the time assignments of others for "lack of funds" even though the districts maintained funds in reserve account.[40] The opinion did state that the employees whose time assignments were reduced had to be selected in the same manner as those released.

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[36] Phillippe v. School Dist. of Springfield Twp., __ Pa. Commw. __, 367 A.2d 1133 (1977).

[37] Tressler v. Upper Dublin School Dist., __ Pa. Commw. __, 373 A.2d 755 (1977).

[38] Yaffe v. Board of Educ. of City of Meriden, 34 Conn. Sup. 115, 380 A.2d 1 (1977).

[39] Frimel v. Humphrey, 555 S.W.2d 350 (Mo. App. 1977).

[40] California School Employees Ass'n. v. Pasadena Unified School Dist., 71 Cal. App. 3d 318, 139 Cal. Rptr. 633 (1977).

A Florida court of appeals examined allegations of a former supervisor of guidance and testing that the board failed to comply with statutory requirements in terminating her position as an economy move.[41] The court, in denying the teacher's petition for review, held that there was no showing that the board acted arbitrarily or in violation of state statutes. The board's reassignment of the duties of the abolished position to an existing one supported the stated reason for the change.

In Washington, a teacher was successful in her challenge of the sufficiency of evidence supporting the nonrenewal of her contract.[42] The reason given by the board was "a reduction in Title I funds and on a program reduction . . . ." The trial court held that the district lacked adequate documentation of program reductions or budgetary restraints sufficient to justify elimination of the position. The appellate court affirmed this judgment.

Call Back Rights

The statutes of some states require boards of education to give preference to former employees suspended or dismissed because of reduction in force when vacancies occur. A Pennsylvania business education teacher was suspended in 1973 due to a decrease in enrollment. On two occasions, after deciding to offer an adult class, the board had a vacancy notice placed in the teachers' lounge. In neither instance did the board notify the teacher and for both classes the board employed an instructor who was neither a regular nor suspended employee of the district. The education association filed a grievance on her behalf and the arbitrator held for the teacher. The court affirmed this determination that she was entitled to an award equal to salary she would have received had she taught the classes.[43]

In Michigan, however, an appellate court overturned a trial court order directing the school district to conduct hearings prior to recalling teachers who were laid off because of a reduction in force.[44] The court said that such rehiring is left to the judgment of the local board.

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[41] Mitchell v. School Bd. of Leon Cty., 347 So. 2d 805 (Fla. App. 1977). *See also* School Bd. of Leon Cty., v. Mitchell, 346 So. 2d 562 (Fla. App. 1977).

[42] Bradfute v. Renton School Dist. No. 403, 557 P.2d 157 (Wash. App. 1978).

[43] Portage Area School Dist. v. Portage Area Educ. Assn., __ Pa. Commw. __, 368 A.2d 864 (1977).

[44] Anderson v. Harper Woods Pub. Schools, 74 Mich. App. 227, 253 N.W.2d 718 (1977).

CONTRACT ISSUES

Individual Contracts

One approach to preparing for the possibility of staff reduction is to include special provisions in the individual employment contract. A Michigan board issued contracts that stipulated that the contract would not be terminated unless there is insufficient revenue to pay salaries and that ten days' notice would be given. During the term of the contract certain teachers received letters indicating that state aid had been reduced by $292,000. Since the district could not operate at a deficit, the letter went on to say, all extra curricular activities were being eliminated and all probationary plus three tenured teachers were being released. The nontenured teachers argued that the ten-day notice provisions were invalid as in conflict with statutory provisions specifying a sixty-day notice prior to the dismissal of nontenured teachers. The court held that the statute was applicable only to situations where the teachers' livelihood and reputation were at issue, not to layoffs solely due to general economic conditions.[45]

Collective Bargaining Argreements

The most complex issue was left till last. The primary reason for this complexity was aptly described by Spenta, Whalen, and Otto in the April 78, *Journal of Law and Education:*

> Public sector negotiations . . . remain caught in a maze of overlapping laws and regulations which frequently contradict each other. Collective bargaining statutes are often established by legislatures with little or no effort given to rescinding prior statutes that can apply to some of the same areas as the bargaining laws. Many bargaining statutes are ambiguous or silent on whether statutes that pre-date the bargaining law retain their force and effect . . . .[46]

The court decisions in this area deal largely with such conflicts in the laws and with the validity and enforceability of agreement provisions applied to RIF situations.

The Washington Supreme Court resolved an apparent conflict in that state's statutes. [47] After the failure in two levy elections, the board had voted to reduce the staff by 214 teachers. The teachers association brought action charging violation of the "meet and confer act" because RIF notices were issued before negotiations were complete. The court concluded that the board acted within its statutory authority.

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[45] Boyce v. Board of Educ. of City of Royal Oak, 76 Mich. App. 526, 257 N.W.2d 153 (1977).

[46] W. Spenta *et al.*, *The Role of Negotiations in the Equation "Declining School Enrollment—Layoffs": A Management Perspective*, 7 J. of L. and Educ. 243, 246 (1978).

[47] Spokane Educ. Ass'n. v. Barnes, 83 Wash. 2d 336, 517 P.2d 1362 (1974). For an analysis of RIF issues in that state *see Reduction in Force Rationale: Teachers "Riffed" in Levy Losses*, 51 Wash. L. Rev. 867-99 (1976).

In some of the cases previously cited, the courts gave deference to provisions of the collective bargaining agreement. For example, in *Axel v. Board of Education of New York City School District,*[48] the teachers' successful claim relative to seniority credit for substitute service was grounded on a contract provision. Also, the teachers claim to call back rights in *Portage Area School District v. Portage Education Association*[49] was filed under the grievance procedure and submitted to binding arbitration with the court affirming the award of the arbitrator.

In a companion *Journal of Law and Education* article, Nassau observed:

> Notwithstanding the fact that courts and labor boards have generally found that a public employer cannot be required to bargain collectively regarding the size of its work force and the decision to layoff employees, these forums typically have determined that such matters, if contained in a collective bargaining agreement as permissive items, will be enforced through contractual procedures, including binding arbitration.[50]

The examples cited support this observation. It should be stressed that the permissible negotiable items related to reduction in force depend on specific state statutes and the courts' construction of them.

CONCLUDING OBSERVATIONS

Although I am tempted at this point to let the record speak for itself, I shall make a few general observations concerning legal implications. Reduction-in-force decisions are more likely to survive judicial scrutiny:

1. when made on a non-discriminatory basis;
2. when carried out in compliance with well formulated policies adopted in advance;
3. when separated from dismissal for cause decisions (acknowledging that this separation is not possible in all states);

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[48] Axel, *supra* note 15.

[49] Portage, *supra* note 40.

[50] S. Nassau, *The Role of Negotiations in the Equation "Declining School Enrollments—Layoffs"*, 7 J. of L. and Educ. 265, 267 (1978).

4. when supported by complete and accurate documentation concerning the need for the action and the basis for selecting affected individuals; and
5. when constitutional and statutory procedural requirements as well as those contained in collective bargaining agreements are followed to the letter.

In closing I find some support for the approach we have taken to this topic in the following quotation from Holmes:

> My keenest interest is excited, not by what are called great questions and great cases, but by little decisions which the common run of selectors would pass by because they did not deal with the Constitution . . . yet which have in them the germ of some wider theory, and therefore of some profound interstitial change in the very tissue of the law.[51]

Hopefully in the decisions we have examined there exists that "germ" to which Holmes alluded.

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[51] O. Holmes, *John Marshall Speeches* 87 Coll. Leg. Pap. 269 (1913).

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Public Law 94-142 and Its Implications for Nonhandicapped Students

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Public Law 94-142, the Education for All Handicapped Children Act of 1975,[1] has been characterized in a variety of ways: a bill of rights for handicapped children, an administrative nightmare, a disaster, a paradigm of educational perfection, a remarkable piece of legislation and a bombshell. The only consensus seems to be that this controversial piece of legislation is destined to have a major impact on American public schools. Why is this law creating so much controversy and commotion? In attempting to answer this question, the first part of this paper focuses on the major provisions of the statute and reactions they have generated in the field. Then, some potential implications of P.L. 94-142 for nonhandicapped children as well as for public education in general are explored.

MAJOR PROVISIONS: ACTION AND REACTION

In essense, Public Law 94-142 guarantees a free, appropriate public education for all handicapped children. The effective administration of this comprehensive law depends upon a series of relationships involving interlocking responsibilities. Each state is required to develop and adhere to a plan which must be approved by the United States Commissioner of Education. Similarly, intermediate and local education agencies must provide evidence that they are conforming to the state plan and must make a formal application to the state which outlines the services that will be provided in return for federal assistance. Each level of government is held accountable for implementing the law through elaborate monitoring procedures.

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[1] Pub. L. No. 94-142 amends Pub. L. No. 93-380, 20 U.S.C. 1401.

The first priority of the law is to make education available to all handicapped children who were previously unserved. The second priority is to provide appropriate programs for the most severely handicapped within each area of exceptionality who are not receiving an adequate education. Among the major provisions of P.L. 94-142 are the following: (1) there must be an intensive and continuing effort to locate and identify handicapped children, evaluate their needs and determine whether those needs are being met, (2) individualized educational programs must be developed for each handicapped child, (3) policies and procedures must be established to safeguard due process rights of parents and children, (4) handicapped children must be placed in the least restrive educational setting, which means educating handicapped children with nonhandicapped children to the extent possible, (5) nondiscriminatory tests and other materials must be used in evaluating a child's level of achievement for placement purposes, (6) parents must have access to their child's records, and the confidentiality of such information must be respected, (7) one state agency must be accountable for ensuring that all provisions of the law are properly implemented by other agencies in the state serving handicapped children, and (8) a comprehensive system for personnel development must be provided.

Several of these provisions have met with controversy among educators in the field. For example, one of the most pervasive and controversial provisions is the requirement that an individualized educational program (IEP) must be developed for each handicapped child. This program must be tailored to the handicapped student's particular needs and capacities and must be designed cooperatively by school officials (who are qualified to provide or supervise such special instruction), the teacher, the parents or guardians, and where possible, the child. The written plan must include a statement of the child's present level of achievement, annual goals and short-term objective, specification of the services that will be provided, and an evaluation schedule to insure that appropriate revisions are made in the individualized program.

Some educators have interpreted the IEP as a legally enforceable contract that will hold school officials accountable for guaranteeing a certain level of pupil achievement. In May, 1977, representatives of an unprecedented coalition of five major educational associations met with the Senate Subcommittee on the Handicapped to discuss their apprehension about implementing P.L. 94-142. One of the major demands of the coalition was that the final regulations of the law should include a statement clarifying that the IEP is to be considered a planning document and not a judicially assailable contract. Although it is currently assumed that the IEP is intended for planning purposes, the final regulations issued in August, 1977 did not clarify the IEP's legal status. No doubt a lawsuit will be required before this issue is finally settled.

Teachers also are concerned about the time commitments required to develop the individualized programs. For the process to be more than a paperwork exercise, personnel must be trained in the use of diagnostic-prescriptive techniques, and time must be available for all members of the planning group to meet on a regular basis. In June, 1978, a ten-member study panel of the National Education Association reported that education officials and teacher organizations must re-examine the traditional school day and find more released time in order for teachers to develop the IEPs. After visiting 43 schools in the process of implementing P.L. 94-142, the panel recommended that teacher groups should design proposals for flexible scheduling, reduced teacher/student contact, and additional compensation for time spent after school in developing the individualized programs.[2]

At present, many negotiated contracts stipulate that teachers cannot be asked to meet after school hours except on specified occasions. Hence, a conflict between the federal mandates and local employee contracts is already occurring in many school districts. Furthermore, teachers are questioning whether it is legal for negotiated contracts to deal with the issue of class size vis-a-vis the number of handicapped children that are placed in a regular classroom.[3]

In addition to concerns involving the IEP, the procedural protections required under P.L. 94-142 for handicapped children and their parents are generating controversy. Among the mandated procedural safeguards are: (1) prior notice to parents and parental consent for changes in the educational placement of the child, (2) opportunity for parental examination of the child's records, (3) opportunity for parents to obtain an independent educational evaluation of the child, (4) opportunity for parents to submit a complaint relating to the identification, evaluation, or placement of the child, and (5) opportunity for parents to initiate agency hearings and judicial proceedings to contest professional recommendations.

Many administrators feel that the procedural mandates will result in volumes of paperwork and valuable time wasted in due process proceedings. At first glance these procedural requirements may appear somewhat ominous, but in actuality, they should not make schools vulnerable to inconsequential attacks. Such procedures should guarantee that fairness and good judgment govern the entire decisionmaking process. The purpose of procedural safeguards is to create a setting in which the interested parties can jointly participate in understanding the needs of the child, designing a plan to meet those needs and assessing the effectiveness of the program designed.[4] Adherence to due process procedures should not automatically create adversary relationships. On the contrary, procedural safeguards should insure better programs for children and more open communication among all parties involved.

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[2] 59 Phi Delta Kappan 725, (June 1978).

[3] *See* Education Daily, March 21, 1978. Teachers also are seeking judicial clarification as to whether educators have a private right to file suit challenging the provisions of Pub. L. 94-142.

Nonetheless, teachers and administrators are concerned that the due process requirements will result in a loss of control among professionals in the decisionmaking process. Since parents must approve the use of diagnostic tests, teachers are alleging that professional judgments are being jeopardized.[5] Moreover, teacher groups are contending that it is unfair for outside arbitrators to have the power to overrule a school board's decision about the placement of a handicapped child but not have similar authority to overrule a school board's position in collective bargaining disputes.

The third provision of P.L. 94-142 that is generating mixed reactions is the mandate that handicapped children should be integrated into the regular public school program where possible, rather than segregated due to their special traits. This requirement that children must be placed in the least restrictive alternative educational setting is grounded in the premise that assessment of each child must be a dynamic process which insures that changes in the child's instructional program are made in an appropriate and timely fashion. Initial grouping decisions no longer can become permanent placements with no provisions for reevaluation of the student's status.

Some concern has been voiced that overzealous attempts to carry out the "least restrictive setting" mandate will result in misguided efforts either to educate handicapped children in classes with nonhandicapped children or to provide similar programs for all pupils in situations where handicapped students actually need special services. Obviously, it would be detrimental for a handicapped child to be placed in a regular classroom unless the child's needs can be most appropriately addressed in such an environment. It is also being alleged that regular classroom teachers are not prepared to handle children with certain types of exceptionalities. Preservice and in-service efforts have not kept pace with the legal mandates, and consequently most regular education teachers have had little training in special education. It certainly would be a cruel hoax to mainstream handicapped children if the process resulted in glorified custodial care or more isolation and frustration for the handicapped child.

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[4] Third Draft Consolidated Concept Paper Under Part B of the Education for All Handicapped Children Act as Amended by Pub. L. 94-142, Department of Health, Education and Welfare, October 15, 1976, at 17.

[5] *See* Education U.S.A., March 27, 1978, at 228.

Another controversial provision of P.L. 94-142 states that "no single procedure shall be the sole criterion for determining an appropriate educational program" for a handicapped child. It is further stipulated that testing instruments must be nondiscriminatory and must be administered in a child's native language. School districts are finding that it is extremely difficult to comply with the letter of this provision because few tests have been designed and validated for assessing handicaps in minority children.[6] Nonetheless, the federal mandates place the burden on the school to demonstrate that evaluation measures are appropriately selected for various racial-ethnic groups. The use of intelligence test scores to place children in special classes already has been contested as discriminatory. In the much publicized California case, *Larry P. v. Riles*, the federal district court ruled that special education assignments could not be based solely on the results of group administered intelligence tests.[7]

Such norm-referenced tests are not the only instruments being challenged. Criterion-referenced items designed for each objective of the IEP are also subject to designer bias as well as to many of the other criticisms being leveled at norm-referenced tests. Turnbull and Turnbull have suggested that school officials should attempt to ameliorate these test bias problems by exploring strategies such as the establishment of regional and ethnic norms and the use of pluralistic evaluation and multifaceted assessment techniques for pupil placement purposes.[8]

The provision of P.L. 94-142 requiring a comprehensive personnel development program for both special and regular educators also has elicited criticism from the field. At present only specialists have appropriate training in dealing with handicapped children. A critical training need exists for other educators to learn about various types of exceptionalities if regular educators are expected to assume a greater part of the responsibility for implementing programs for handicapped children. However, those charged with designing in-service efforts voiced frustration over the law's built-in hurdles. Since the first priority of P.L. 94-142 is to provide services for handicapped children who have been previously unserved, federal funds under Part B of the law cannot be expended for in-service programs until the first priority of the legislation is met. As a result, many children are being mainstreamed into regular classes where teachers have had little or no training in handling handicapped pupils. State officials in Michigan have asserted that even after the first priority of the law is met, the federal funds for staff development provide only "a drop in the bucket" compared to the resources needed to adequately train personnel.[9]

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[6] H. Turnbull & A. Turnbull, Free Appropriate Public Education (Denver: Love Pub. Co., 1978), at 95-100.

[7] Larry P. v. Riles, 343 F. Supp. 1310 (N.D. Cal. 1972), 502 F.2d 693 (1974).

[8] Turnbull & Turnbull, *supra* note 6.

In addition to issues related to retraining efforts, there is concern being voiced about the additional clerical assistance and teacher aids necessary if schools are to properly carry out the mandates of the individualized educational programs. It has been estimated that 250,000 additional employees will be needed in order to meet the full service mandate of P.L. 94-142.[10] Obviously, these individuals must be provided comprehensive training programs.

Furthermore, it has been noted that P.L. 94-142 does not make any provisions for preparing the trainers themselves.[11] Since local school districts will be responsible for providing the necessary training activities, a cadre of highly skilled trainers must be available. Also, there must be changes in preservice programs and state certification requirements to reflect the needs among all educators for knowledge and skills in the area of special education.

The above provisions are not the only aspects of P.L. 94-142 that have created controversy. In fact, perhaps the greatest concern continues to be voiced over the funding formula. Under the law, the formula for federal assistance is based upon a percentage of the national average expenditure per public school pupil times the number of handicapped children being served in the school districts of the state. This percentage is to escalate on a yearly basis until 1982 when it is to become fixed at 40 percent for all subsequent years. Some states have asserted that the full 40 percent appropriation is needed now in order to fully implement the law's lofty provisions.

Furthermore, P.L. 94-142 stipulates that federal funds can be used *only* for excess costs for handicapped children and not to supplant state and local funds up to the amount expended on nonhandicapped students. Education officials have asserted that this restriction is unrealistic due to the fiscal burden placed on local districts to locate and appropriately educate handicapped children who were previously unserved. In May, 1978, Massachusetts became the first state to ask for a waiver of this stipulation. Under the law, however, a waiver is available only to states providing "clear and convincing evidence that all handicapped children have available to them a free appropriate education."[12] Thus, the waiver provision does not promise much relief to states with the greatest need to improve their educational programs and services for handicapped children.

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[9] Education Daily, June 1, 1978, at 4.

[10] J. Harvey, *Future Trends in Personnel Preparation*, 43 Exceptional Children, 149 (Nov. 1976).

[11] W. Warnat, *In-Service Education: Key to P.L. 94-142's Service to Handicapped Children and Youth*, 35 Educational Leadership, 477 (March 1978).

There is also much apprehension being voiced over the fact that P.L. 94-142's mandates must be carried out irrespective of the envisioned federal assistance. The mere authorization of federal funds does not guarantee appropriations which must be made by Congress on a yearly basis. When President Ford signed P.L. 94-142, he expressed concern over the "false expectations" raised by the "excessive and unrealistic" federal authorization levels:

> Unfortunately, this bill promises more than the Federal government can deliver and its good intentions could be thwarted by the many unwise provisions it contains .... Despite my strong support for full educational opportunities for handicapped children, the funding levels proposed in this bill will simply not be possible if federal expenditures are to be brought under control and a balanced budget achieved over the next few years.[13]

Based on the initial count of handicapped children for the 1979-80 school year, Congress appropriated only 12 percent of special education costs instead of the 20 percent authorized in the law. Commissioner of Education Boyer has admitted that the states must make a greater fiscal contribution than had been expected, but several senators have responded that most individual states are in no position to pick up the tab for the excess costs.[14] The Council for Exceptional Children announced that it was "deeply disappointed" that there should be a 400 million dollar shortfall so early in the implementation process of P.L. 94-142.[15]

Although criticism and controversy continue to be generated over many provisions of P.L. 94-142, all states are making at least some

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12. Education Daily, May 15, 1978, at 4.

13. Presidential message, the Education for All Handicapped Children Act of 1975, National Ass'n of State Directors of Special Education, Inc., Washington, D.C.

14. Education Daily, March 6, 1978, at 3.

15. Education Daily, May 18, 1978, at 4.

attempt to comply with its mandates. It appears that the imposition of sanctions on states for noncompliance will be somewhat lenient during the first few years of implementation. Due to the complexity of the provisions and the monitoring procedures, it may be quite some time before individual school districts and/or states actually have federal funds withheld or other penalties imposed because they are not adhering to the specified mandates.

IMPLICATIONS FOR THE NONHANDICAPPED CHILD

What impact will the massive mandates on behalf of handicapped children have on the nonhandicapped public school student? The current trend in litigation and legislation is toward mandating full services for all children. Is this a realistic goal, or will the emphasis on meeting the needs of handicapped children have a detrimental effect on offerings for nonhandicapped children? Can the recent legal mandates be applied to selected groups of children, who admittedly have been disadvantaged in the past, without greatly influencing *all pupils* in public schools? Will children with other types of special needs (e.g., culturally disadvantaged or gifted pupils) receive judicial protection similar to that being afforded to handicapped pupils? Or will a double standard emerge with the nonhandicapped child being offered an optimum program designed specifically for his or her needs? Will advocates of the "regular" child capitalize on the legal mandates regarding "special" children to demand that public schools provide programs tailored to the divergent needs of all students? These, and similar questions need to be addressed by citizens, educators and justices.

Many subtle and complex issues, with vast implications for the future of public education, are emerging from the legislative attempts to protect the interests of special classes of children. For example, the mandated individualized educational programs for handicapped children may eventually have an impact on educational offerings for all students. Logically, the next step would be for nonhandicapped children to assert that they have a right to similar programs since they are compelled to attend school. Ideally, each student's instructional program *should* be individualized, but are citizens willing to channel the necessary funds into public schools to make this service become a reality? And if not, is there a denial of equal protection of the laws when such individualized programs are required only for certain students?

Another issue with far-reaching ramifications pertains to the elaborate accountability procedures being mandated to monitor the progress of handicapped children. Public Law 94-142 requires school districts to assess the handicapped child's level of performance, establish goals and objectives, specify services to be provided, and conduct annual progress reviews. In addition, the law outlines strict monitoring procedures to be followed at the state and local levels in order to evaluate the effectiveness of the individualized education programs. If similar accountability procedures were required for all children, this would have a massive, and perhaps long overdue, impact on public schools.

The absence of such accountability for pupil progress has already been contested in several cases, most notably the *Peter Doe* case in California. In this case plaintiffs claimed that the public school district failed in its responsibilities since a child who possessed the ability to learn to read was reading on a fifth grade level upon high school graduation.[16] Furthermore, the pupil was successfully passed from grade to grade, and his parents were never informed of his reading deficiencies. Peter Doe's claim for redress has not yet prevailed, and it seems unlikely that in the near future schools will be held accountable for a specified level of student performance. However, it is conceivable that schools will be held responsible for accurately reporting pupil progress to parents and demonstrating that special services have been provided for students with academic deficiencies. If schools must be accountable for monitoring the progress of handicapped children and for providing them with appropriate services, should not a future Peter Doe be able to make a similar legitimate request?

A related issue with potentially far reaching impact pertains to the extensive due process procedures being specified for handicapped children to insure appropriate program placement. Courts and legislatures are evaluating the procedures used to prevent erroneous classifications as well as assessing the effectiveness of instructional programs. Thus, procedural requisites are being required before handicapped students have their educational status changed in any manner.[17] Schools must provide parents with written notification prior to changing a child's placement, and parents wishing to contest the recommendation must be afforded a hearing complete with full procedural safeguards. Similar protections have not been required for the nonhandicapped child, but they may be demanded in the near future. The delivery of these services to all students would certainly place an additional burden on the schools. But again, is the equal protection clause abridged if the handicapped child is granted procedural safeguards to guarantee that instructional programs are appropriate to needs, while the "regular" child's fate is left to the discretion of school officials?

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[16] Peter Doe v. San Francisco Unified School Dist., 131 Cal. Rptr. 854 (1976).

[17] *See* Mills v. Board of Educ. of the District of Columbia, 348 F. Supp. 866 (D.D.C. 1972).

Another due process issue with vast implications is the stipulation that board members cannot serve as hearing officers in disputes between their school systems and parents of handicapped children.[18] The rationale behind this stipulation is that board members have a "clear interest" in the outcome of a hearing and therefore cannot be impartial. There are obvious implications of this mandate for other due process proceedings in public schools. At present, board members are allowed to serve as final decisionmakers in student disciplinary actions and teacher dismissal proceedings. In 1976, the Supreme Court ruled that the school board was considered an impartial tribunal in dismissing striking teachers even though the board was involved in an adversary relationship with the teacher organization.[19] Undoubtedly, subsequent Supreme Court declarations will be necessary on behalf of handicapped children and judicial precedents regarding procedural protections afforded to other students and teachers.

Testing practices currently used as the basis for many pupil grouping plans may also feel reverberations from the legal activity surrounding the rights of handicapped children. Since tests used to determine handicapping conditions must be nondiscriminatory, administered in the students' native languages and accompanied by other diagnostic procedures, could every student in a public school assert a claim to similar safeguards? And if so, would this eventually cause most ability grouping schemes to be subjected to judicial scrutiny? Although more high school pupils experience ability tracking than nearly any other educational feature, the procedures used to determine placement in many of these tracking plans would not satisfy the criteria outlined in special education mandates. Conceivably, students may start claiming that they are unconstitutionally stigmatized by practices which determine whether they pursue a basic education course of study instead of a college preparatory program or that their future earning power is diminished by tracking methods presently used in many secondary schools. These allegations may sound far-fetched, but the potential for such claims is alarmingly real. Perhaps the increasing judicial and legislative sensitivity to discriminatory testing practices is a straw in the wind, signaling the eventual demise of many ability grouping plans as they are currently designed.

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[18] The Office of Civil Rights issued this interpretation of Pub. L. 94-142 regulations in August, 1978. *See* Education Daily, August 16, 1978, at 4.

[19] Hortonville Joint School Dist. v. Hortonville Educ. Ass'n, 426 U.S. 482 (1976).

Also, the mandated "least restrictive educational setting" for handicapped children has the potential to influence the educational services for nonhandicapped students. The implications of this mandate, however, are of a different nature from the ones discussed thus far. Whereas other provisions of P.L. 94-142 have the potential to improve educational programs for all students, the "least restrictive setting" requirement may actually have a negative impact on services for the "regular" child. In some school districts the concept of mainstreaming has been prematurely implemented before teachers and administrators have gained the necessary knowledge and skills. Handicapped children have been placed in regular classrooms although their needs actually have dictated an alternative setting. In some of these situations the classroom teacher is spending a disproportionate amount of time attempting unsuccessfully to meet the needs of a misplaced child. It is conceivable that nonhandicapped children will begin initiating reverse discrimination cases, alleging that they are being denied equal protection of the law because they are compelled to attend school but are not receiving their fair share of teacher attention.

The total public educational system may also feel the impact of recent legal mandates that require states to pay tuition for handicapped children in private institutions if appropriate services are not available in the public domain.[20] These court declarations and legislative enactments have many subtle implications for future educational litigation. Limits have not yet been established as to how far the state's responsibility extends in providing for special types of students' needs. Could children with unique characteristics other than handicaps demand that the state pay tuition in private institutions if appropriate programs are not offered in the public schools? Perhaps the musically talented child or the academically gifted student will demand such tuition payments if it can be substantiated that the public school program does not address the student's special talents or provide a scholastically challenging educational experience. If such claims should receive judicial support, where would the school's obligations finally end? And would the public actually be willing to fund *appropriate* programs to meet every type of unique need?

Other provisions of P.L. 94-142 have similar implications for nonhandicapped children and for the entire public educational program. Indeed, it may take many years for parents and educators to realize the full potential of these mandates. As citizens become more sophisticated in using legal tools to challenge school practices, it seems eminent that lawsuits, seeking benefits outlined in P.L. 94-142 for other groups of children, will escalate.

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[20] *See* Kruse v. Campbell, 431 F. Supp. 180 (E.D. Va. 1977), *vacated and remanded* 46 U.S.L.W. 3213 (U.S. Oct. 4, 1977); *In re* Butcher, 372 N.Y.S.2d 514 (1975).

FUTURE DIRECTIONS: ISSUES AND ALTERNATIVES

Since courts and legislatures are still in the process of defining the scope of the state's responsibility to provide appropriate programs for various classes of students, the final act in this legal scenario is yet to come. There are several possible directions that might be pursued. For example, legal mandates on behalf of children with special traits could increase with requirements that public school programs be tailored to the unique needs of other identifiable classes of children who are not being served adequately at the present time. Carrying this course of action to an extreme, one must question whether the provision of all such services would be within the realm of possibilities. If limits are not set regarding the types of special needs that must be addressed by public schools, an unrealistic drain could be placed on school budgets which are already stretched too thin.

A second possible outcome might be the institutionalization of a double standard for evaluating the appropriateness of public school programs. An educational program meeting *minimum* standards of adequacy, as articulated in school finance cases,[21] would be required for most children attending public schools. On the other hand, an *optimum* program, individually designed to meet the child's unique needs and capacities, would be required for handicapped and other special children who have been the victims of past discrimination. Such a course could very likely set the stage for a wave of legal battles asserting the rights of the "regular" child.

A third possible direction might be judicial and legislative retrenchment. Courts and legislatures may determine that they have opened a Pandora's box, and thus retreat in placing demands on the public schools to provide for the full range of students' needs. Such a retreat might be grounded in the rationale that the lack of "manageable standards" in addition to the lack of resources makes the educational needs issue nonjusticiable.[22]

Perhaps the most optimistic direction would be for courts and legislatures to retain their sensitivity toward the educational needs of "special" children and begin evaluating the suitability of public school programs to the needs of *every* student. After all, it seems ironic to compel children to attend school if appropriate educational benefits do not accrue from the experience. In short, following this alternative, efforts would be directed toward upgrading all public school services instead of reacting to isolated symptoms. Assuming that such a course should come to fruition, the federal legislation that has been heralded as the Bill of Rights for handicapped children[23] could become the Bill of Rights for *all* children. Egalitarians certainly would consider this last alternative to be the most palatable one, but it lacks that certain ring of realism since school districts are facing an increasing financial crisis. In the aftermath of Proposition 13, bond issues are failing across the nation, and states are not demonstrating a willingness to shoulder the fiscal burden. Moreover, the federal government is appropriating funds only for special types of programs. Therefore, if judicial and legislative mandates were to become more explicit regarding the appropriateness of all public school programs, funds to support the necessary services would have to be accessible from all levels of government.

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[21] San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973); McInnis v. Shapiro, 293 F. Supp. 327 (N.D. Ill. 1968), *aff'd sub nom.* McInnis v. Ogilvie, 394 U.S. 322 (1969).

[22] McInnis, *Id.*

CONCLUSION

Federal legislation pertaining to the educational rights of handicapped children has been necessary because many students have been denied an education or compelled to attend school and relegated for years to glorified custodial care. Courts and Congress have properly intervened to expose the discriminatory practices, protect the children's interests at stake and mandate special programs for handicapped children. However, it is imperative to assess the possible impact of these mandates on the total public school program and reevaluate current directions before courts and legislatures make greater demands on schools, dissipating energies and funds, with all children emerging the losers. If legal mandates regarding special programs should increase without necessary appropriations, all public school offerings could become diluted by well-intentioned, but fragmented, activities. Unless efforts to upgrade educational delivery systems are coordinated, the entire public school program could become the victim of special interest groups vying for the limited resources, and all pupils could be denied a substantive education.

Without question, Public Law 94-142 holds great potential for educational reform at all levels. But it also has the potential to foster a double standard for evaluating program adequacy in public schools.

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[23] Leroy V. Goodman, *A Bill of Rights for the Handicapped*, 121 American Education, (July 1976) at 6.

Will it result in more broken promises or will it actually become a vehicle to upgrade educational programs for all children? The challenge is before us, and all individuals involved with the educational profession have a part to play in determining the final answer.

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Church-State: Duty of the Employer to Make Religious Accommodations for Employees

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INTRODUCTION

In mid-July, 1976, according to Assistant Attorney General J. Stanley Pottinger, the Justice Department filed its first religious discrimination suit against a school board for dismissing a teacher who was absent from school several days observing religious holidays.[1] In August, 1977, a United States District Court (Eastern District-Wilmington, N.C.) sustained Pender County School Board's decision (jury trial) dismissing an auto mechanics teacher, who insisted his dismissal occurred because he missed nine school days for religious holidays.[2] The jury deliberated only 35 minutes. Moreover, the case was further complicated because the teacher's provisional certificate condition had not been settled. In 1977 a California Appeals Court sustained a school board's decision dismissing a tenured teacher who was absent 31 days for religious reasons.[3]

The First Amendment free exercise clause prevents any governmental regulation of religious beliefs.[4] Moreover, the 1964 Civil Rights Act prohibits an employer from failing or refusing to hire an individual because of religion. In 1972 Congress further amended the Civil Rights Act religion provision insisting that "religion" encapsulates all aspects of religious observance, practice, and belief; that an employer must reasonably accommodate an employee's (even a prospective employee) religious observance or practice. However, the statute provides that religious accommodation need never work an undue hardship on the employer's business conduct.[5] Thus, these decisions and subsequent cases, the First Amendment religious freedom and the 1964 Civil Rights Act with 1972 additions juxtapose school boards (employers in general) and employees in a serious legal confrontation.

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[1] The News and Observer, Raleigh, North Carolina. July 14, 1976, at 2.

[2] Cressman v. Board of Education, Civ. Action No. 75-0034 (E.D.N.C. August 18, 1977).

[3] Rankins v. Commission on Professional Competence, 141 Cal. Rptr. 101 (Ct. App. 1977).

[4] U.S. Const. Amend. I.

Of course, this church-state issue encompasses a much larger employment scene (as the topic of the manuscript indicates) than education. Indeed, the major cases are from the American industry/business employment marketplace with minor considerations from education. The major focus, then, of this manuscript concerns the duty of the employers to make religious accommodation for employees. Thus, a sensible plan for manuscript organization is: (1) examine the First Amendment, *Rankins* case (education case); (2) the larger compelling activity—the 1964 Civil Rights Act and 1972 Amendment with major Supreme Court decisions (cases are from both industry/business and education); and (3) summary and conclusion.

FIRST AMENDMENT

The First Amendment provides "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; . . ." The California *Rankins* case, mentioned above, was brought on the First Amendment "free exercise clause." A tenured teacher joined the World Wide Church of God in 1971. The teacher's vigorous participation in the religious organization accounted for 31 missed (without authorization) teaching days between 1971-1975. The teacher insisted the missed days were holy days of his religious faith. However, the school board in 1973 notified him of the board's disapproval and insisted that further unauthorized absences would be construed as "the persistent failure to abide by the rules of the district"—a justifiable cause for dismissing tenured teachers under the California law. Of course, the teacher continued his religious imperative and the school board instituted dismissal proceedings. The State Commission on Professional Competence dismissed the board's action insisting there was no justifiable rationale. The school board filed action in Superior Court and the Court suspended the Commission's decision. On appeal the California Court of Appeals insisted that teacher competence was not the issue. The issue, said the Court, was the interpretation of First Amendment free exercise clause. Continued the Court:

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[5] Civil Rights Act (1964), *amend.* (1972).

> While the free exercise clause prevents any governmental regulation of religious beliefs, in this case we are concerned not with . . . (the teacher's) beliefs but only with his religious practices and leaving his teaching duties for the purpose of religious observances while under contract with the district.[6]

The Court drew a relationship between the teacher's contractual obligation and the state's compelling interest in education and insisted: (1) The teacher was absent without the school board's authorization for religious purposes; (2) the teacher's contract was a clear obligation; (3) the school board could not maintain an appropriate education setting with teacher's absences; and (4) the above reasons encapsulate the state's compelling interest in education.

THE 1964 CIVIL RIGHTS ACT AND 1972 AMENDMENT

The Civil Rights Act 1964 prohibits any employer from failing or refusing to hire an individual because of religion.[7] The 1972 Amendment added the following definition:

> The term religion includes all aspects of religion observance and practices, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observances or practice without undue hardship on the conduct of the employer's business.[8]

The Civil Rights Act raises three serious questions (two questions from the Civil Rights Act itself and one constitutional issue) for school boards and employers in general that have been part of litigation. They are: (1) The "reasonable accommodation"—"undue hardship" dichotomy and school board decisions concerning employees' religious practices; (2) Does the 1964 Civil Rights-1972 Amendment religious clause violate the First Amendment's establishment clause; and (3) To what extent must union contracts reasonably accommodate all religious practices for its members.

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[6] Rankins v. Commission on Professional Competence, 141 Cal. Rptr. 101 (Ct. App. 1977).

[7] Civil Rights Act, Tit. VII, 42 U.S.C. 2000e (a) (1) (1964).

[8] Civil Rights Act (1964), *amend.* (1972), Tit. VII, 42 U.S.C. 2000e (j).

Employment "Reasonable Accommodation"—"Undue Hardship"

On June 15, 1977, the United States Supreme Court in *Trans World Airline, Inc. v. Hardison*[9] provided substantial direction concerning the above Civil Rights mandate. The facts of *Trans World Airline, Inc.* are: (1) Hardison was employed in the maintenance department (which is operated 24 hours per day) for which all shift and job assignments were governed under union contract; (2) TWA was initially able to accommodate Hardison's Saturdays because of sufficient seniority; (3) However, Hardison was transferred (at his request) to another job with low seniority; (4) Saturdays were no longer free and the union was unwilling to violate the seniority system; (5) TWA rejected Hardison's four-day week request because of "impaired critical function" in the operation; (6) TWA declined to fill Hardison's Saturdays with otherwise available personnel because of overtime pay; and (7) TWA refused to arrange a swap schedule with other employees because such action would violate seniority of the union contract. Thus, Hardison absented himself from Saturday work. He was provided a hearing and fired for insubordination for refusing to work his shift. Hardison litigated and the Federal District Court insisted that both TWA and the Union had satisfied the "reasonable accommodation" provision of 42 USC 2000c (j).

On appeal the United States 8th Circuit Court of Appeals, while affirming the Union's position, reversed and maintained that TWA had not exercised gentle care and concern for Hardison's religious practices.[10] Both TWA and IAM (International Association of Machinists and Aerospace Workers) petitioned for certiorari insisting adequate action on behalf of Hardison's religious practices was taken. Moreover, TWA and IAM maintained "to require further efforts at accommodation would create an establishment of religion contrary to the First Amendment . . . ."[11] TWA further complained that District Court's findings of fact were ignored by the Circuit Court. At this juncture of the Court's record, it is important to note that IAM is no longer a litigant—"Since we reversed the judgment against TWA, we need not pursue further the Union's status in this Court."[12]

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[9] Trans World Airlines, Inc. v. Hardison, 432 U.S. 63 (1977).

[10] *Id.* at 63 (The Court of Appeals suggested "reasonable accommodation" include: (1) Hardison could work four-day work week with supervisor and/or another worker "filling in"; (2) Use other available personnel even though premium overtime pay is issue; and (3) TWA could arrange a "swap" for Hardison even though a seniority system violation occurs.) The U.S. Supreme Court rejected all three as undue hardship.

[11] *Id.* at 70.

[12] *Id.* at 71 (The IAM insisted that serious union interest encapsulating "religious accommodations" and collective bargaining agreements were at issue and needed judicial direction.)

Associate Justice Byron White delivered the 7-2 decision (Justices Brennan and Marshall dissenting). In reviewing both legislative and judicial history, Justice White insisted the effort had been directed toward "eliminating discrimination in employment . . . with respect to race, color, religion, sex, or national origin."[13] Continuing, Justice White directed attention to the Equal Opportunity Employment Commission (EEOC) 1967 guidelines which required employers to make reasonable accommodations to the religious needs of employees:

> . . . to make reasonable accommodations to the religious needs of employees where such accommodations can be made without undue hardship on the conduct of the employer's business.[14]

Pursuing the EEOC 1967 mandate, Justice White viewed the Court's historical ambivalence. The 1971 *Dewey* case[15] focused on Reynolds Metals' discharge of an employee who refused to work on Sunday—intuitively obvious religious practice. Reynolds Metals argued that EEOC lacked authority to adopt the "1967 guideline"; furthermore, the "guideline" was unconstitutional as advancement of religion—a First Amendment violation. Only eight Justices heard the *Dewey* case, with a split 4-4 vote and no written opinion.

In order "to resolve by legislation" the issues not resolved by the Supreme Court in *Dewey*, the United States Congress adopted the 1972 Religious Amendment to Title VII:

> The term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business. 701 (j), 42 U.S.C. 2000e (j)[16]

Senator Jennings Randolph, the driving Senate force and who coined the phrase "to resolve by legislation" insisted that the purpose of the statute was "to assure that freedom from the religious discrimination in the employment of workers is for all-time guaranteed by law . . . ."[17]

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[13] *Id.* at 71. *See* Griggs v. Duke Power Co., 401 U.S. 424 (1971); McDonald v. Santa Fe Trail Transportation Co., 427 U.S. 273 (1976); Franks v. Bowman Transportation Co., 424 U.S. 747 (1976); and McDonnell Douglas Copr. v. Green, 411 U.S. 792 (1973).

[14] *Id.* at 72. (EEOC did not define either "reasonable" and/or "undue hardship.")

[15] Dewey v. Reynolds Metals Company, 402 U.S. 689 (1971) (see also Dewey v. Reynolds Metals Company, 429 F.2d 324 (1970). The 6th Circuit Court found for Reynolds Metals and insisted that EEOC "1967 Guideline" was satisfied as gestured by allowing the employee to find his own Sunday replacement.)

[16] 118 Cong. Rec. 706 (1972).

[17] 118 Cong. Rec. 7167 (1972).

Yet, neither the statute nor Senator Jennings Randolph define with any degree of specificity the application of "reasonable accommodation."

In 1976 the Supreme Court was presented with another opportunity to decide "reasonable accommodation" in *Parker Seal Company v. Cummings.*[18]

The 6th Circuit Court of Appeals: (1) found for the employee; and (2) insisted the statute did not violate the First Amendment establishment clause.[19]

An equally divided 4-4 Supreme Court affirmed the lower court's decision with no written opinion.[20] This action, in substance, places the Supreme Court squarely on both sides of the question. One might add that this is not an unusual position for the Supreme Court.

With the IAM question appropriately shelved, the Civil Rights Act—the First Amendment's establishment conflict deferred, and the historical analysis properly reviewed, Justice White delivered the Court's homily. He insisted TWA had made a reasonable effort to accommodate Hardison's religious practices. To do more, suggested Justice White, would create a pejorative condition for TWA.

Justice White, while acknowledging that neither a union contract and/or a seniority system could mutilate the Civil Rights Act, the statute imperative to "reasonably accommodate" would cause TWA to employ management decisions inconsistent with "an otherwise valid agreement."[21] In rejecting the Court of Appeals "three reasonable alternatives" and bemoaning the lack of a clear and present signal from the United States Congress, Justice White acknowledged the poverty of Hardison's and EEOC's position. There are two possible alternatives, continued Justice White: (1) "adopt a neutral system, such as seniority, a lottery, or rotating shifts" and (2) allow employees' religious need(s) and practice(s) dictate the days off policy.[22] Continuing, Justice White said:

> TWA would have had to adopt the latter in order to assure Hardison and others like him of getting the days off necessary for strict observance of their religion, but it would have done so only at the expense of others who had strong, but perhaps nonreligious reasons for not working on weekends. There were no volunteers to relieve Hardison on Saturdays, and to give Hardison Saturdays off, TWA would have had to deprive another employee of his shift preference, at least in part,

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[18] Parker Seal Company v. Cummings, 429 U.S. 65 (1976).
[19] Cummings v. Parker Seal Company, 516 F.2d 544 (6th Cir. 1975).
[20] Parker Seal Company v. Cummings, 429 U.S. 65 (1976).
[21] Trans World Airlines, Inc. v. Hardison, 432 U.S. 79 (1977).
[22] *Id.* at 80-81.

> because he did not adhere to a religion that observed the Saturday Sabbath.[23]

Justice White insisting the statute did not provide for unequal treatment but focused on "eliminating discrimination . . . directed against majorities as well as minorities."[24] Even though Hardison charged both TWA and IAM with religious discrimination, Justice White maintained that there was no discriminatory intent in the case. Quoting from the Federal District Court Opinion:

> "'The seniority system was not designed with intention to discriminate against religion nor did it act to lock members of any religion into a pattern wherein their freedom to exercise their religion was limited. It was coincidental that in plaintiff's case the seniority system acted to compound his problem in exercising his religion.'"[25]

The Court of Appeals had concluded that TWA was not bound by the seniority system. Justice White said that such conclusion "was in substance nothing more than a ruling that operation of the seniority system was itself an unlawful practice even though no discriminatory purpose had been shown."[26] Title VII, said Justice White, does not require an employer "to carve out special exemptions" to a seniority system in order to satisfy junior employees' religious practices where senior employees' seniority rights are at stake.

The Court of Appeals had insisted that TWA could do much more for Hardison such as: (1) allow Hardison to work a four day week; (2) use supervisory staff and/or qualified personnel to fill Hardison's work schedule; and (3)shift "available employees" to Hardison's shift even though premium wage must be paid.

Justice White rejected this argument by insisting that all alternatives would increase TWA's cost and reduce efficiency—"To require TWA to bear more than a *de minimis* cost in order to give Hardison Saturdays off is an undue hardship." There was considerable differences of judicial opinion between the District Court and Circuit Court of Appeals over the *de minimis* cost. Justice White accepted the District Court's position as quite correct.

Finally, Justice White said:

> In the absence of clear statutory language or legislative history to the contrary, we will not readily construe the statute

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[23] *Id.* at 81.

[24] *Id.* at 81.

[25] Hardison v. Trans World Airlines, Inc., 375 F. Supp. 883 (W.D. Mo. 1974).

[26] Trans World Airlines, Inc. v. Hardison, 432 U.S. 82 (1977).

> to require an employer to discriminate against some employees in order to enable others to observe their Sabbath.[27]

Associate Justice Thurgood Marshall filed a challenging and emotional opinion with which Justice William Brennan joined. Reviewing the legislative and judicial history of Title VII, set against the backdrop of minority religious faiths "in a society that truly values religious pluralism" Justice Marshall was deeply troubled and perplexed and found the Court's decision intolerable. Justice Marshall found no difficulty in insisting that the statute, within First Amendment constitutionality, "can—require employers to grant privileges to religious observers as part of the accommodation process."[28] Calling attention to the Court's judicial "unequal treatment" logic, if Hardison were accommodated, Justice Marshall said,

> That is quite true. But if an accommodation can be rejected simply because it involves preferential treatment, then the regulation and the statute, while brimming with "sound and fury," only ultimately signif(y) nothing.[29]

This will always be the case, insisted Justice Marshall, where religious practice conflicts with a "neutral rule'"—"work attire . . . required attendance at some religious function . . . membership in a union . . . work schedule . . ."[30]

Calling attention to the legislative history of Title VII, especially the 1972 amended version, Justice Marshall said the Court "seems almost oblivious . . . of Congressional intent."[31] How could the Court possibly rationalize this system against the judicial backdrop of *Dewey*, *Yoder*, *Zorach*, *Lemon*, *Walz*, and many others, asked Justice Marshall? Furthermore, how anyone could conclude that TWA suffered undue hardship "defies both reason and common sense" said Justice Marshall.[32] He rejected the District Court's *de minimis* cost position and accepted the Court of Appeals' stand as more closely correct. However, the Court of Appeals position was much too limited, said Justice Marshall. The record will just not support the contention that TWA "undue hardship" would be more than *de minimis*. Is $150 for three months staggering, asked Justice Marshall? Furthermore, there is no evidence that TWA suffered "efficiency loss."

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[27] *Id.* at 85.
[28] *Id.* at 91.
[29] *Id.* at 87.
[30] *Id.* at 87.
[31] *Id.* at 87, 89.
[32] *Id.* at 91.

> . . . I do not believe that it can even be seriously argued that TWA would have suffered 'undue hardship' to its business had it required respondent to pay the extra cost of his replacement, or had it transferred respondent to his former department.[33]

Finally, Justice Marshall recommended two alternatives for the Court to consider: (1) pay overtime to a voluntary replacement and pass the cost to Hardison (Hardison agreed to work overtime without premium pay); and (2) allow Hardison to transfer back to his previous position. Both alternatives, acknowledged Justice Marshall, violated the union contract. But by the same stroke, neither option violated seniority rights under the contract.

Education Related Cases

There are two education related minority religious discrimination cases: *Cressman v. Board of Education Pender County*[34] and *Davis v. Bridgeport School District.*[35]

Cressman v. Board of Education Pender County

John Cressman was an auto mechanics teacher at Topsail High School for four years, teaching on a "provisional vocational certificate." His World Wide Church of God membership mandated 37 missed days over four years (this, of course, does not include sick-day absences and other reasons for absence) for religious practices. The plaintiff often promised to provide adequate substitute teachers with detailed lesson plans, materials, and instructional procedures. According to the school superintendent and principal these promises were never realized. In the meantime, and to further complicate Cressman's legal position, he needed an additional course for certification. Certification was not completed in the allotted time, for which Cressman blamed the school superintendent. Thus, by School Board action in the spring of 1974, Cressman's contract was not renewed because (1) improper certification; and (2) "undue hardship" due to religious practices. Almost a year later Cressman filed action charging the school board with religious discrimination under the Civil Rights Act—Title VII and the First and Fourteenth Amendments. After filing suit Cressman tried to enroll in courses necessary to satisfy certification requirements. A written request from the school superintendent was necessary for admission, but no written request was forthcoming. Cressman said the school board indicated an employment reconsideration if he promised to limit religious practices within the annual four days personal leave.

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[33] *Id.* at 96.

[34] Cressman v. Board of Education of Pender County, Case No. 75-0034-Civ-7 (E.D. 1977).

[35] Davis v. Bridgeport School Dist., (no case number at this writing, October, 1978) according to attorneys for the Bridgeport School District—Whitemore and Warren—Wenatchee, Washington the case has not come to trial.

In responding to Cressman's claim, school officials denied religious discrimination. Relying heavily on *Hardison*, school officials insisted that a teacher who missed nine or ten consecutive days "was educationally unsound and disrupted the educational process"—undue hardship. Even though school officials acknowledged Cressman's claim of employment reconsideration if religious practices were limited within the four days annual leave, he (Cressman) was simply without proper certification.

Federal District Court Judge Cavett Clark instructed the jury that the law requires an employer to take reasonable steps to accommodate employees' religious practices. Justice Clark said:

> The Court tells you that if you believe from the evidence that the School Board was motivated entirely in failing to renew plaintiff's contract by the demand for religious holidays by the plaintiff and that the School Board failed to make a reasonable effort to accommodate the plaintiff in this regard, then you will find your verdict for the plaintiff. On the other hand, if you should find from the evidence that the defendant was motivated in failing to renew the plaintiff's contract by the plaintiff's failure to secure certification, then you shall find your verdict for the defendant. Furthermore, if you should find that the School Board was motivated in failing to renew the contract of the plaintiff entirely by the religious holidays requirements of the plaintiff but that to allow such requirements would constitute an undue hardship on the operation of the school system, then you must find your verdict for the defendant. The Court also tells you that if you should find from the evidence that the School Board was motivated by the failure of the plaintiff to be certified and that it was also motivated by the demand for religious holidays and that the School Board had not attempted to reasonably accommodate the plaintiff's religious practices, you would also find for the defendant.[38]

The two-cause dismissal decision, perhaps, complicated the judicial mandate of Title VII. Under the circumstances one valid cause is enough for dismissal. Judge Clark said:

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[38] Cressman v. Board of Educ. of Pender Cty., Case No.-75-0034-Civ-7 (E.D. 1977).

> . . . if one cause is valid that is sufficient excuse in the eyes of the law for the failure to renew even though the other motivating cause may be tainted by religious discrimination providing the School Board would have failed to renew on that ground alone.[37]

The jury deliberated only 35 minutes and found for the school board.

There are so many important unanswered constitutional questions in this case to raise question of the adequacy of the deliberation of only 35 minutes by the jury. However, for an indication of judicial thinking, one should read Justice Clark's entire charge to the jury.

Davis v. Bridgeport School District, (No case number and no trial date set)

There is little to report on the *Davis* case at this writing period. As already indicated this is the first minority religious practice suite filed with the Department of Justice. Sketchy facts of the case are: (1) Richard Avis was a math and science teacher in the Bridgeport School System for nine years; Davis belonged to the World Wide Church of God (same as *Cressman* and *Hardison*) which mandates eight religious holidays while school was in session; (3) Davis offered to supply materials for classroom continuity purposes; (4) Davis was first fired by the Bridgeport School District June, 1974, and reinstated on statutory procedural violations; (5) he was subsequently fired again in the fall of 1974, and filed complaints with EEOC and Washington State officials; (6) an effort towards conciliation was initiated by state officials but rejected by the school board; and (7) the Department of Justice filed a discrimination suit seeking reinstatement with back pay and an injunction forbidding religious discrimination.

According to a letter from the Whitemore and Warren law firm, school board attorneys, their position is: (1) there are no qualified substitutes to teach Davis' subject matter courses; and (2) Bridgeport is far from major population centers where qualified substitute math and science teachers are hard to come by. Thus, the school board will argue (and the attorneys fully realize the burden of proof is with the school board) the impossibility of providing an adequate educational program with such improper absences and that Davis as a science and math teacher possesses "unique qualities for which he was hired" and substitute replacements, such as they are, would merely provide "a babysitting service for the student . . ."[38] According to a letter to this writer dated September 13, 1978, this case is still months away from trial. However, a pre-trial conference was set for September 25, 1978.

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[37] *Id.* at 2-3.

[38] Letter dated September 13, 1978. Whitemore and Warren, Attorneys at Law, Wenatchee, Washington.

SUMMARY AND CONCLUSION

The Supreme Court (7-2 decision) in *Hardison* resolves some issues concerning the 1964 Civil Rights Act, Title VII, Amended 1972 and raised other serious constitutional and legislative questions concerning employees' religious practices, especially Saturday Sabbatarians. *Hardison* differs somewhat from *Dewey* and *Parker Seal Company v. Cummings:*[39] (1) the Court was setting *en banc*; and (2) both employer and union opposed Hardison's appeal for relief. The Court found for TWA insisting "to require TWA to bear more than a *de minimis* cost in order to give Hardison Saturdays off is an undue hardship." Many serious church-state issues that are yet to be resolved are or were not even seriously discussed in *Hardison*. Some are:

(1) Does the 1964 Civil Rights Act, Title VII amended 1972 violate the First Amendment establishment provision? Both TWA and IAM argued that the statute violated the tri-partite test established in *Lemon I*: ((1) Does the statute have a secular purpose? (2) Does the primary effect either advance or inhibit religion? and (3) Is there excessive government entanglement?) While the 1972 Amendment collided with the tri-partite test suggested both by TWA and IAM, the District Court and the Court of Appeals found the Act constitutional. The Supreme Court did not confront the issue in *Hardison;* simply postponing until another day and another case. However, 6th Circuit Court Judge Celebrezze dissented in *Cummings*, and insisted that the 1972 Amended Act grants preferential treatment to certain employees' religious practices, thereby advancing religion. Yet, there are powerful arguments to the contrary. Perhaps all religious practices for the majority of Americans are simply denominational habits, practices and customs for which we have grown accustomed and for which the industry/business marketplace has accommodated. For minority religious people, they are just arbitrary religious mandates which seem to circumvent their religious dictates. Thus, majority arbitrary religious mandates should be no more or less constitutionally sheltered than minority religious mandates. For example, Sunday Sabbatarians should have no more constitutional shelter than Saturday Sabbatarians. The profundity for the church-state issue is intuitively obvious. Presumably, the Supreme Court will not forever delay this unanswered question raised in *Hardison*.

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[39] 516 F.2d 544 (1975).

(2) Many minority religious practices questions remain unanswered. The scope of Title VII far exceeds Hardison's Saturday Sabbatarian complaints. Such religious imperatives as style and cut of hair, beard, clothes and general dress, and patriotic utterances such as flag saluting are a few considerations. A glance into the judicial crystal ball, based on *Hardison* results, indicates difficulties for plaintiffs.

(3) The Supreme Court in *Hardison* insisted that a clear and clarion Congressional mandate must exist before a contrary decision could be expected. The United States Equal Employment Opportunity Commission since *Hardison* has been holding hearings around the nation. Moreover, Senator Jennings Randolph (West Virginia) has publicly stated that he will seek amendments to the Act accommodating Saturday Sabbatarians. In June, 1978, the House of Representatives enacted the Federal Employees Flexibility and Compressed Work Schedule Act of 1978. Introduced by Representative Stephens J. Solarz (Democrat from New York), the Act provides for employees to work overtime schedules at normal pay (Justice Marshall's suggestion in *Hardison*) satisfying time requirements lost in religious practices. The Act does not require employers to provide compensatory time. In the meantime, the FEFCWS Act is before the Senate.

Another minority religious practices bill—wide sweeping—has been introduced by Representative Robert F. Drinan (Democrat from Massachusetts). The bill provides for religious practices accommodation by employers unless such accommodation causes"severe pecuniary or other material loss . . ." The Drinan Bill appears to more approximately satisfy EEOC's position, for Justice(s) Marshall and Brennan and many who testified before EEOC, and of course, the important question is: Should the burden of "undue hardship" proof be placed on employers?

Whether Senator Randolph, Congressman Solarz, Congressman Drinan and or others introduce legislation, sooner or later there will be Congressional action. In light of *Sherbert v. Verner*[40]; *Wisconsin v. Yoder*[41]; *Roemer v. Board of Public Works*[42]; and *Wolman v. Walters*[43], it will be difficult for the Supreme Court to declare the legislation unconstitutional. Nonetheless, the Supreme Court has no Aristotlean logical mandate and often finds itself squarely behind both sides of the issue. If the Supreme Court declares the Civil Rights Amendment unconstitutional then it will be interesting to see how the

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[40] 374 U.S. 398 (1963).

[41] 406 U.S. 205 (1972).

[42] 426 U.S. 736 (1976).

[43] 45 U.S.L.W. 4861 (June 24, 2977).

Court squares its thinking with decisions sustaining constitutionality of conscientious objector laws exempting objectors from military service. Surely "the plight of the non-objector who must take the objector's place and as a result loses his life in combat is far more serious than that of a company which has to pay time and a half for a substitute of a fellow employee who would prefer not to work on Saturday."[44]

(4) A point should be made concerning American labor organizations. The Supreme Court in *Hardison* deferred constitutional confrontation concerning union contracts and minority religious practices until another day. Surely no one can doubt that future collective bargaining agreements that fail to consider minority religious practices will be overturned. Majority arbitrary religious practices should be no more or less union sheltered than minority arbitrary religious practices. While the 1935 National Labor Relations Act allows a union to negotiate a contract for all employees in the bargaining unit and it is generally recognized and accepted that the contract is "locked in concrete"; nonetheless, future contracts, regardless of exacerbating elements, must provide for minority religious practices.

(5) A coherent analysis of the legal aspects of school employees' minority religious practices is difficult due to: (1) insufficient litigation with clear judicial direction (speculation is tempting); (2) the question of "reasonable accommodation"—"undue hardship" dichotomy, the scope and limitation is unclear; (3) EEOC guidelines and further Congressional action is anticipated; and (4) lack of Supreme Court clarification of serious constitutional issues mentioned above.

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44. L. Pfeffer, *Workers Sabbath: Religious Belief and Employment*, 31 Church and State 1 (Jan. 1978). Silver Springs, Maryland.

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Religion in the Public Schools—the Twilight Zones

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I would like to start out on a fairly simple level by briefly discussing the First Amendment. This may seem pretty senseless, because we all know that "Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof". But we must be sure to understand the basic principles behind the Amendment and its two segments—Establishment and Free Exercise—in order to analyze properly any legal problem that might arise in this area.

The basic principle underlying the First Amendment is one of "governmental neutrality." In the case of *Epperson v. Arkansas*, the United States Supreme Court set out this principle, stating that:

> Government in our democracy, state and national, must be neutral in matters of religious theory, doctrine and practice. It may not be hostile to any religion or to the advocacy of no-religion; and it may not aid, foster, or promote one religion or religious theory against another or even against the militant opposite. The First Amendment mandates governmental neutrality between religion and religion, and between religion and non-religion.[1]

It is the Establishment Clause of the First Amendment that prohibits the fusion of governmental and religious functions or dependency of one upon the other. The Free Exercise Clause further provides for neutrality by guaranteeing every person the freedom to choose his or her own religion and to define his or her own relationship between these two clauses in several well known school prayer cases.

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[1] 393 U.S. 97, 103 (1968).

In *Engel v. Vitale*,[2] the New York State Board of Regents had passed a requirement that a particular prayer be said aloud by each class in the presence of the teacher at the beginning of each school day. The Court found that this practice was wholly inconsistent with the Establishment Clause, and in so ruling, made some distinctions between the Establishment and the Free Exercise Clauses, stating that:

> Neither the fact that the prayer may be denominationally neutral nor the fact that its observance on the part of the students is voluntary can serve to free it from the limitations of the Establishment Clause, as it might from the Free Exercise Clause, of the First Amendment, both of which are operative against the states by virtue of the Fourteenth Amendment. Although thse two clauses may in certain instances overlap, they forbid two quite different kinds of governmental encroachment upon religious freedom. The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce non-observant individuals or not.[3]

Shortly after the decision in *Engel*, the Supreme Court combined the cases of *School District of Abington v. Schempp* and *Murray v. Curlett*[4] for consideration. Both cases involved the reading of verses from the Holy Bible at the beginning of each school day. In its opinion, the Court went into a detailed discussion of the Establishment and the Free Exercise Clauses, and concluded with respect to the Establishment Clause that the test to be applied was "what are the purpose and the primary effect of the enactment?" That is to say that to withstand the strictures of the Establishment Clause, there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion.

In explaining the Free Exercise Clause, the Court established the principle that has come to be known as "Reasonable Accommodation". The Court stated that the Free Exercise Clause withdraws from legislative power, state and federal, the exertion of any restraint on the free exercise of religion. Its purpose is to secure religious liberty in the individual by prohibiting any invasions thereof by civil authority. Hence, it is necessary in a free exercise case for one to show the coercive affect of the enactment as it operates against him or her in the practice of his or her religion.

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[2] 370 U.S. 421 (1962).

[3] *Id.* at 430.

[4] 374 U.S. 203 (1963).

Thus, the distinction between the two clauses is apparent, a violation of the Free Exercise Clause is predicated on coercion while the Establishment Clause violation need not be tied with such a coercive intent.

In its holding, the Court applied Establishment Clause principles to the two cases, and found that the Bible-reading practice was unconstitutional. The Court stated that these required exercises were not mitigated by the fact that individual students may absent themselves upon parental request, for that fact furnishes no defense to a claim of unconstitutionality under the Establishment Clause.

In *Schempp* and *Murray*, the parents were protesting the practices required in the schools. But the reverse situation has also arisen. In the case of *Stein v. Oshinsky*,[5] the Court had before it a complaint against the principal by parents of kindergarten children who had been prohibited from reciting the prayer, "God is great, God is good, and we thank Him for our food, Amen". The principal had further ordered that his teachers stop the saying of any prayers in the classroom. This was a case that came up before the Second Circuit and was later denied certiorari by the Supreme Court. The Court of Appeals found that the school authorities were well within their rights in refusing the children the right to pray, stating that the determination of what is to go on in public schools is primarily for the school authorities. The authorities acted well within their powers in concluding that the parents must content themselves with having their children say their prayers before 9:00 a.m. or after 3:00 p.m. The school's action presented no unworkable conflict with deeply held religious belief.

In an attempt to clarify the Supreme Court's determinations in the religious cases, Justice Burger developed a three part test for determining whether a state action involves a violation of the Establishment Clause in the case of *Lemon v. Kurtzman*.[6]

1. That the act must have a secular legislative purpose;
2. Its primary affect must be one that neither advances nor inhibits religion; and
3. The act must not foster an excessive government entanglement with religion.

Justice Burger did modify the boundaries of this test, however, in the case of *Tilton v. Richardson*,[7] where he concluded that:

> Every analysis must begin with the candid acknowledgement that there is no single constitutional caliper that can be used to

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[5] 348 F.2d 999 (2d Cir. 1965) *cert. denied*, 382 U.S. 957 (1965).

[6] 403 U.S. 602 (1971).

[7] 403 U.S. 672 (1971).

> measure the precise degree to which these three factors are present or absent. Instead, our analysis in this area must begin with a consideration of the cumulative criteria developed over many years and applying to a wide range of governmental action challenged as violative of the Establishment Clause.[8]

Before we go into the Twilight Zone, I would like to briefly set out the scope of the Supreme Court's decisions in reference to First Amendment Establishment and Free Exercise Cases. To date, the Court had approved as constitutional: the loaning of books on secular subjects to students attending non-public schools; the upholding of state property tax exemptions for religious organizations; the appropriation of federal construction grants to church-related colleges and universities; the provision of non-categorical grants to private colleges, the funds of which are not to be used for sectarian purposes; the reimbursement to parents of money spent by them for bus fares to send their children to private schools; released time to attend religious classes not supported by tax dollars and off of school property; silent periods for meditation; supplying such standardized tests and scoring services as are used in the public schools, with non-public school personnel not being involved in the test drafting or scoring, and no financial aid being involved; providing speech and hearing diagnostic services and diagnostic psychological services in the non-public schools; and supplying to students needing specialized attention therapeutic, guidance and remedial services by employees of the local board of education or the state department of health, with these services being performed off of non-public school premises.

The Court has, however, ruled the following unconstitutional: state programs requiring Bible readings and recitation of the Lord's Prayer in public schools; recitation of a non-denominational state prayer in the public schools; an Arkansas statute prohibiting the teaching of evolution in public schools; state supplements for teacher salaries and secular services in religious schools; tuition reimbursement and tax deductions to the parents of children attending sectarian schools; the use of tax funds by parents to educate their children in parochial schools; providing instructional materials, equipment, professional staff and auxiliary services to non-public schools; and providing field trip transportation and services to students at non-public schools.

Well, from what we've mentioned so far, it certainly appears that there are many religion-related activities in which the schools can become entangled. There is an area between the portion of the First

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[8] *Id.* at 677.

Amendment proscribing the school's activity in prohibiting the free exercise of a religion and on the other extreme, the proscription that a school shall not establish a religion. There's a substantial gray area in between. The school must tolerate religions and religious beliefs but must maintain neutrality in all matters related to religion. Such "gray area" activities—out there in the twilight zone—include baccalaureate and graduation services, Thanksgiving, Christmas and Easter programs where a substantial portion of the program is devoted to activities with religious overtures, school-sponsored student clubs with a religious theme, such as our Christian Students' Unions, and prayers before Board of Trusteee Meetings, athletic events, and PTA Meetings. Some of the lower courts have focused on these or similar problems, and, even though they may not be as instructive as you may like, a review of their holdings can provide some direction. Let's start with graduation services.

I've located three cases that involve alleged unconstitutional injections of religion into high school graduation ceremonies. The three courts agreed that such functions were official school functions even though they might be planned by students, voluntary in nature, and not held on school grounds. They also agreed that the First Amendment prohibitions against both the Free Exercise and Establishment of religion were applicable. The courts, however, took different approaches as to the balancing of the interests involved.

In a Pennsylvania case, *Wiest v. Mt. Lebanon School District*,[9] the State Supreme Court found that the free exercise of religion was not infringed significantly by the inclusion of an invocation and benediction in the graduation exercises. Since attendance was voluntary there was no coercive effect on anyone to worship in a certain way. Nor was there a violation of the Establishment Clause; the facts were insufficient to support a finding that either the purpose or primary effect of the resolution providing for an invocation and benediction at the commencement exercises was to advance religion. The Court held that "the practice here is a permissible accommodation between church and state.".

A United States District Court in Wisconsin faced a similar question in *Lemke v. Black*.[10] The objectionable practice in this case was holding the graduation in a Roman Catholic Church. Although concluding that "the use of a church facility by a state agency for a secular purpose is not per se a violation of the First Amendment," the court held that under the circumstances the Free Exercise Clause was violated even though attendance at the ceremony was voluntary. The District Court determined that:

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[9] 457 Pa. 166, 320 A.2d 362 (1974), *cert. denied*, 419 U.S. 967 (1974).
[10] 376 F. Supp. 87 (1974).

> Graduation is an important event for students. It represents official recognition of the successful completion of several years of scholastic endeavor and symbolizes transition into a more mature society than was previously available to the students. it is cruel to force any individual to violate his conscience in order to participate in such an important event in the individual's life.[11]

Perhaps even more significant to the Court in this case was the fact that the decision to hold the graduation in the church had stirred up sectarian political strife among the students and in the community. A basic purpose of the First Amendment was seen to be to prevent the arousal of such strife. While the decision to hold the graduation in the church may have had no sectarian motivation, it did involve the school board in a sectarian dispute; therefore, the decision could not be upheld.

The third case was heard in a Federal District Court in Virginia, and like the Pennsylvania case, involved the inclusion of an invocation and benediction in a graduation program. In *Grossberg v. Deusebio,*[12] the District Court believed, as in Pennsylvania, that any infringement was minimal. The *Grossberg* Court decided that:

> The event, in short, is so fleeting that no significant transfer of government prestige can be anticipated. There is no state financial outlay and the Court cannot visualize the organs of state government becoming infected by a divisive religious battle for control of this brief and transient exercise. Government here is not "embroiled" in religious matters.[13]

Our second gray area involves holiday programs. The leading case concerning First Amendment violations in holiday programs is *Allen v. Morton.*[14] In *Allen,* a nativity scene was one of a group of objects, including secular symbols of the holiday such as a reindeer, a yule log and Christmas trees, which were assembled on government property to show how the American people celebrate the holiday season surrounding Christmas. The Court of Appeals for the D.C. Circuit found that the involvement of government officials on various planning and organization committees of the Christmas Pageant violated the entanglement test of the Establishment Clause. In defining the test used for entanglement, the Court noted that:

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[11] *Id.* at 89.
[12] 380 F. Supp. 285 (E.D. Va. 1974).
[13] *Id.*
[14] 495 F.2d 65 (D.C. Cir. 1973).

> Government involvement with religion should be kept to a necessary minimum, and that there should be avoided not only the actual interference, but also the potential for an appearance of interference with religion.[15]

Basically, the Court was disallowing any government involvement that could be used to support the nativity scene. In another case, a New York Court held that a school board's resolution, permitting a group of citizens to erect upon a small portion of spacious school grounds a nativity scene during a period of the Christmas holidays, when school was not in session and without any involvement of the school personnel, and at no expense to the school district, did not constitute the establishment of religion. That case was *Lawrence v. Buchmueller.*[16]

The Second Circuit set out some of the factors which must be considered in determining whether an event violates the Establishment Clause in the case of *Curran v. Lee.*[17] Those factors include a description of the program, the degree of church participation, whether music played is religious or non-religious, whether the scenes or floats depict religious or non-religious events, and whether any speeches made were on religious or non-religious topics.

In general, school observances of holidays are acceptable if done educationally rather than devotionally. The use of nativity scenes or other references to Christ should be avoided, however, in order to preserve neutrality.

Our third venture into the Twilight Zone takes us into the field of Bible Distribution, using the Bible as a resource book, and religion courses in general. The Fifth Circuit recently struck down Bible distribution in the case of *Meltzer v. Board of Public Instruction or Orange County.*[18] There, the Court held that the school board's use of the school system as a means of distribution amounted to its placing, at least in the eyes of children and perhaps their parents, its stamp of approval upon the Gideon version of the Bible, and therefore created an unconstitutional preference for one religion over another.

In reaching their decision, the Fifth Circuit relied heavily on the New Jersey case of *Tudor v. Board of Education of Borough of Rutherford*[19]—

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[15] *Id.*

[16] 243 N.Y.S.2d 87 (Sup. Ct. 1963).

[17] 484 F.2d 1348 (2d Cir. 1973).

[18] 548 F.2d 559 (5th Cir. 1977), rehearing *en banc* granted, 553 F.2d 1008 (5th Cir. 1977).

[19] 100 A.2d 857 (N.J. 1953), *cert. denied*, 348 U.S. 816 (1954).

a State Supreme Court case that was later denied cert. In that case, the distribution of Bibles was also struck down, for the following reasons. First, the distribution would create a subtle pressure on all children to accept the Bibles, second, it would leave the impression that school authorities had given the Bible a stamp of approval, and third, tensions among religious groups would be increased. The Court found that the arrangement constituted a preference of one religion over others and was thus unconstitutional.

The use of the Bible as a resource book was discussed by the Supreme Court in *Schempp*, where the Court stated that:

> . . . it might well be said that one's education is not complete without a study of comparative religion or the history of religion and its relationship to the advancement of civilization. It certainly may be said that the Bible is worthy of study for its literary and historic qualities. Nothing we have said here indicates that such study of the Bible or of religion, when presented objectively as part of a secular program of education, may not be effected consistently with the First Amendment.[20]

Since the Court implied, in the *Schempp* decision, that the study of the Bible may be presented objectively in a secular program of education, school authorities have been uncertain as to how far they may go in teaching about religion without violating the First Amendment. A federal court ruling on a Virginia case, *Vaughn v. Reed*,[21] held that weekly classes conducted by teachers sent to the schools by an outside private organization, purporting to teach about religion rather than to indoctrinate students, violated the First Amendment. The *Vaughn* Court set out three guidelines for setting up constitutionally permissible religion courses. First, they felt that every student should be required to attend. Once the school board determines that a particular course should be taught in schools, the Court saw no justification for allowing a student or his parents to decide that the student will not attend. Second, the school board should hire and control the teacher, rather than using teachers paid and controlled by religious groups, and third, the teachers must conscientiously refrain from any action which amounts to the indoctrination or practice of religion.

Under the holding in *Vaughn*, courses offered for school credit by organizations outside of the school system would not be constitutionally permissible. A religious history course or a course in comparative religion established under the *Vaughn* guidelines, would, however, be more likely to withstand constitutional attack.

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[20] Abington School Dist. v. Schempp, 374 U.S. 203, 225 (1963).

[21] 313 F. Supp. 431 (S.D. Va. 1970).

An interesting case was recently decided by the Federal District Court in New Jersey. There, a course in Transcendental Meditation was offered as an elective at five high schools in the state. The course was labeled as "philosophical", taught the technique of meditation, and purported to explain what occurs within a meditator's mind during meditation and to describe an entity or concept called "creative intelligence". The teachers were not employees of any of the five school boards; rather, they were paid by an organization which sought to disseminate the theories associated with Transcendental Meditation. The textbook used in the course taught that there existed and has existed eternally an unmanifested or uncreated field of life which is unbounded or infinite.

The Court first undertook to determine the nature of "creative intelligence", and determined that, although the precise conceptions or definitions of the ultimate reality or supreme being will differ from religion to religion, the religious nature of the concept is incontrovertible. Whether God is considered an ultimate principle or being or essence or entity or field of life from which the universe is based, has no bearing on the religious nature of the concept. It was determined that concepts of "God" or an ultimate level of life or ultimate reality as taught in this course were religious concepts.

The Court then applied the three-part test that we discussed earlier, finding first that, although the secular purpose of offering the course was to make the alleged benefits of this technique available to students, the governmental agencies had sought to effect that secular goal by promotion of a religious concept. Under the second part of the test, the Court found that the promulgation of a belief in the existence of a pure, perfect, infinite, and unmanifest field of life clearly has a primary effect of advancing religion and religious concepts. And finally, since both the state and federal government had provided financial aid for the course, the Court held that both the federal government and the state of New Jersey had given aid which clearly constituted an excessive government entanglement in religion. The offering of the transcendental meditation course was, therefore, held to violate the First Amendment's Establishment Clause.

A fourth area that poses many problems involves school's sponsorship of a religious student organization. In *Johnson v. Huntington Beach Union High School District*,[23] a California court held that permitting a Bible Study Club to meet and conduct its activities on the school campus during the school day was prohibited by the

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[22] Malnok v. Maharish Mahesh Yogi, 440 F. Supp. 1284 (N.J. 1977).
[23] 137 Cal. Rptr. 43 (1977).

Establishment Clause. The factors considered by the court in this case were: that the club meetings were held during the school day; that free space, lighting and heat would be provided by the school; that school policies required a faculty sponsor for all approved organizations; and that school policies also required that an audit of the organization's accounts be conducted by the school. All of these factors are considerations which could be taken into account by a school district in examining the status of religious student organizations.

A different result may be reached if the question is whether the use of physical facilities of a state university by church affiliated student organizations would violate the Constitution. It could be argued that the recognition of student clubs, including some religiously oriented clubs, has a secular purpose of encouraging students to meet to discuss ideas and pursue goals of common interest and promote the secular purpose of establishing a pluralistic community. The essential difference here, though, is that college students are involved. This presentation has been generally concerned with elementary and secondary pupils. But, the Supreme Court in *Tilton v. Richardson*,[24] specifically noted that, "There are generally significant differences between the religious aspects of church-related institutions of higher learning and parochial elementary and secondary schools . . . . There is substance to the contention that college students are less impressionable and less susceptible to religious indoctrination."[25]

I think that this would indicate that it might be inappropriate to apply principles established in religious cases dealing with college and university students to a religious problem arising at the elementary or secondary level.

Our fifth gray area, and it's very gray, involves prayers at extra curricular events. Take prayers at PTA meetings for example. Although no cases have addressed this issue, prayers at either PTA or school board meetings do not seem to present any problem for us. As we have already noted, adults are less susceptible to ideologies than are students in public schools.

Prayers at athletic events have also not been challenged in the courts as of yet, but organized prayer in school facilities outside of school hours has been struck down in at least one lower court case. In *State Board of Education v. Netcong*,[26] a New Jersey court considered a program in which, prior to the formal opening of school, students would meet in the gym and listen to the reading of the chaplain's remarks from the Congressional Record, and follow this with a period of meditation. The court held that this was an unconstitutional establishment of religion, and was not essential to the student's free exercise of religion. This position could conceivably be extended to public prayers at football games. There is also no clear directive as to a coach leading his team in silent meditation before a game. The coach certainly shouldn't force any athlete to participate, but a moment of silent meditation would probably be approved.

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[24] 403 U.S. 672, (1971).
[25] *Id.* at 685, 686.
[26] 270 A.2d 412 (1970), *cert. denied*, 401 U.S. 1013 (1971).

The question of whether students' rights to free exercise of their religious beliefs or freedom of speech are violated in this type of situation was addressed in *Hunt v. Board of Education of County of Kanawha,*[27] where a U.S. District Court in West Virginia heard an action to enjoin a school board from prohibiting students to meet voluntarily on the premises of a public school for the purpose of engaging in group prayer. The Court referred to an important Supreme Court quote from the case of *Poulos v. New Hampshire*, where the Court said that: "The principles of the First Amendment are not to be treated as a promise that everyone with opinions or beliefs to express may gather around him at any public place and at any time a group for discussion or instruction."[28]

The Court in *Hunt* found that the school board, in the exercise of its administrative discretion, had the right to prohibit the use of school facilities for all religious activities and such prohibition did not deny public school students their federal constitutional rights of freedom of speech, freedom of assembly, or free exercise of their religious beliefs. In reaching this result, the Court had to do a balancing act with all of the various rights and interests involved.

Our final unclear area is one that raises many concerns; that is, the sharing of facilities between public schools and church-related organizations. The primary issues here are whether public funds are being used for sectarian purposes and whether sectarian influences are being exercised in public schools.

In regard to public funds for sectarian purposes, problems arise when a school district leases part or all of a building from a church or a parochial school. This action was at issue in the case of *State ex. rel. School District of Hartington v. Nebraska State Board of Education.*[29] The Supreme Court of Nebraska held in that case that it was not unconstitutional for public school districts in need of classroom space to provide, through a grant of federal funds, for special education needs of deprived children by leasing classrooms in parochial schools. The classrooms were used for public school purposes, they were under the control of public school authorities, and the instruction offered was entirely secular and non-sectarian. The Supreme Court did deny certiorari in this case.

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[27] 321 F. Supp. 1263 (W. Va. 1971).

[28] 345 U.S. 395 (1952).

[29] 195 N.W.2d 161 (1972), *cert. denied*, 409 U.S. 921 (1972).

To reverse this situation, school districts have also permitted church-related groups to use school facilities, so long as the public school program is not disturbed, and the primary purpose of the use does not constitute aid to the religious activities of the church. In *Southside Estates Baptist Church v. Board of Trustees*,[30] the Florida Supreme Court considered an action of a local school board permitting several churches to temporarily use various school buildings on Sunday, pending completion of the construction of church buildings. The court held that the action did not violate the Establishment or Free Exercise Clause of the First Amendment, for there was no evidence that one denomination was given a preference over any other or that public funds or property were involved in the establishment of a religion.

It should be noted, however, that these cases involved the use of public facilities only on a temporary basis. A different problem may, in fact, be presented if the issue became one of the regular use of public school property for religious activities. Actually, that problem was addressed very recently in a State Supreme Court case from New Jersey. In that case, the court did hold that the prolonged use, during non-instructional hours, of public school facilities by a religious group was impermissible under the Establishment Clause, when there was no evidence of an immediate intent to construct or purchase their own building.[31]

That concludes our examination of the "Twilight Zones" concerning religion in the public schools. Although the United States Supreme Court has not had a fact situation before it involving any of the activities that we've discussed, the Court does mention some similar activities in *Zorach v. Clauson*.[32] As you remember, the Court in *Zorach* upheld a statute which provided for the release of public school pupils from school attendance to attend religious classes. In upholding the statute, the Court said that a common sense approach must be taken in dealing with the principle of separation of church and state, because if that idea was carried to its extreme, according to Justice Douglas,

> Municipalities would not be permitted to render police or fire protection to religious groups. Policemen who help

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[30] 115 So. 2d 697 (Fla. 1959).

[31] Resnick v. East Brunswick Township Board of Educ., 343 A.2d 127 (N.J. 1975).

[32] 343 U.S. 306 (1952).

> parishioners into their places of worship would violate the Constitution. Prayers in our legislative halls, the appeals to the Almighty in the messages of the Chief Executive; proclamations making Thanksgiving Day a holiday; "so help me God" in our courtroom oaths—these and all other references to the Almighty that run through our laws, our public rituals, our ceremonies would be flouting the First Amendment. A fastidious atheist or agnostic could even object to the supplication with which the Court opens each session: "God save the United States and this Honorable Court."[33]

In summary, if a school district will take such a common sense approach and adhere to a policy of neutrality which accommodates both the Establishment and Free Exercise Clauses, it will prevent the kind of involvement that can lead to governmental control of churches or governmental restraint of religious practice. To quote Chief Justice Burger,

> The general practice deductible from the First Amendment and all that has been said by the Court is this: That we will not tolerate either governmentally established religion or governmental interferences with religion. Short of these expressly prescribed governmental acts, there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.[34]

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[33] *Id.* at 312.
[34] Walz v. New York Tax Commission, 397 U.S. 677 (1970).

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The Law and Private Colleges

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The law as it applies to private colleges as distinct from public institutions has grown considerably in the past few years. To cover the topic completely would not be possible in the time allowed. Therefore, the coverage is restricted to four areas: "state action", The Equal Opportunity Act, the contract relationship, and collective bargaining.

STATE ACTION

Private colleges and universities may be held to the constitutional standards of public institutions if it can be demonstrated that they are engaged in "state action." Generally speaking, private colleges can be said to be engaged in state action when their activities are closely involved with a public function or purpose. But what constitutes such involvement? Because of the complexity of the concept of state action, and the tendency of the courts to consider each case individually, only a case by case examination can hope to provide any understanding of this issue.

An early civil rights case which illustrates such involvement concerned a restaurant operated in a publicly owned parking facility. The restaurant, which rented space from the facility, refused to serve blacks. The court held that such activity was constitutionally impermissible and that the state was closely involved in the activity since the facility was built with public funds and was operated by a public agency.[1] The court also pointed out the necessity of considering this issue on a case-by-case basis.

In another case which draws a clear distinction between public and private functions within a private college, the Dean suspended seven

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[1] Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961).

Alfred University students for protest activities. Four of the students attended the Liberal Arts College while three attended the Ceramics College which was supported almost totally by the State of New York. The court held that the Dean was required to provide due process to the students from the Ceramics College but was not under the same obligation with regard to the Liberal Arts students.[2]

A 1974 case in the Second Circuit listed five factors which should be weighed by courts in considering whether the requisite state action is involved in the acts of private institutions.

1) the degree that a private institution is dependent on government aid;
2) the extent and intrusiveness of government in regulating the activity or scheme (Is the institution acting specifically pursuant to a government rule or law);
3) whether the scheme connotes government approval or whether assistance is provided to all without such connotation (in this instance laws controlling foundations encourage them in their public functions);
4) the extent the organization serves a public function or acts as a surrogate for the state;
5) whether the organization has legitimate claims as a private organization in associational or other constitutional terms.

A year later this same court in hearing a sex discrimination case against Syracuse University remanded the case for hearing based on the Jackson criteria.[4] The acts complained of occurred prior to the Equal Employment Act of 1972 which holds private colleges to equal employment practices under Title VII of the Civil Rights Act of 1964. The court in Weise recognized a double standard in state action cases. In race discrimination cases, courts have been "particularly vigilant" and the court recognized sex discrimination as "invidious class-based discrimination." The Weise court stated:

> . . . consideration of whether there is state action involved in allegedly discriminatory action entails a balancing process; as the conduct complained of becomes more offensive and as the nature of the dispute becomes more amenable to resolution by a court, it becomes more appropriate to subject the issue to judicial scrutiny.

In another sex discrimination case decided a year earlier, a U.S. District Court in Pennsylvania held that "the Commonwealth has so far

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2. Powe v. Miles, 407 F.2d 73 (1968).
3. Jackson v. Statler Foundation, 496 F.2d 623 (2d Cir. 1974).
4. Weise v. Syracuse University, 522 F.2d 397 (1975).

insinuated itself into a position of interdependence with the University (of Pennsylvania) that it must be recognized as a joint participant in the challenged activity." The University received facilities rent-free from the state, annual appropriations, tax exemption, research funds and scholarships. In addition the University varied admission standards for Pennsylvania residents applying to the Medical and Veterinary Schools and residents of the state paid a reduced tuition. The state, the court pointed out, was the University's informal partner.[5]

In a case which followed the rationale for state action as presented in *Weise* and *Jackson*, the Supreme Court of Minnesota, while *not* holding that state action was present, stated that, "Given the nebulous character of state action, we think it would have been proper to dismiss plaintiffs' constitutional claim at this stage of the proceedings. Since the complaint sufficiently alleged state action, we must assume its existence."

The plaintiff, a student who had been expelled from Hamline University Law School for poor grades, alleged unfairness on the part of Hamline and that he was discriminated against in the determination of his grades. He claimed the university engaged in state action on the basis that the university was a duly qualified Minnesota nonprofit corporation and educational institution, received substantial financial support in the form of direct grants and guaranteed student loans, was exempt from ad valorem and other taxes, and otherwise enjoyed substantial subsidy, support, and protection by the government of the United States and the State of Minnesota and the university performed the essentially governmental function of providing professional education to the public.

In considering the student charges the court cited a 1908 Minnesota decision[7] which placed a common law duty upon universities not to arbitrarily expel a student. The court stated that, "The requirements imposed by the common law on private institutions parallel those imposed by the due process clause on public universitites."

The court permitted the case to proceed and the judicial examination of the allegations of arbitrary and capricious conduct. The reasoning of the court appears similar to that of the Weise Court. While not actually accepting the state action theory, the court appears to be saying that the "dispute is amenable to resolution by a court."

The courts appear to be divided on the issue. Three months later the Seventh Circuit,[8] in another case of alleged sex discrimination, held that the Illinois Institute of Technology did not act under color of state law

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5. Rackin v. University of Pennsylvania, 386 F. Supp. 992 (1974).
6. Abbariao v. Hamline University School of Law, 258 N.W.2d 108 (1977).
7. Gleason v. University of Minnesota, 116 N.W. 650 (Minn. 1908).
8. Cohen v. Illinois Institute of Technology, 524 F.2d 818 (7th Cir. 1975).

even though the institution used the state's name, received state grants of $100 to $200 per student, benefited from the state's use of eminent domain and was chartered and regulated by the state. In this case also the acts complained of occurred prior to the Equal Employment Act of 1972.

A year later in the First Circuit the court held that state action did not exist where the university received 12.5 percent of its budget from the commonwealth in the form of student aid, was exempt from property taxes, and promulgated rules and regulations as required by the Council on Higher Education.[9]

An interesting claim for state action was made for Harvard Law School by a rejected applicant.[10] He argued that Harvard was a public institution by virtue of it historic connection with the Massachusetts Bay Colony. The court held that for at least a hundred years Harvard has been treated as a private educational institution by both public and private sectors of Massachusetts and that there was no connection between Harvard's admission policy and the Commonwealth.

In light of the Equal Employment Act it may appear that this issue of state action *vis-a-vis* the private college may have lost some of its importance, at least with regard to the employment issue. This remains to be seen. The 1972 amendments to the 1964 Civil Rights Act provide a cause of action for individuals who are discriminated against with respect to employment in educational institutions. Plaintiffs are required to show that discrimination was based on race, color, religion, sex or national origin. Public colleges are held to the full due process requirements of the 14th amendment while private colleges are not. For a private college to be held to the same requirements, state action must be shown, and the burden of proof is on the plaintiff to show involvement.

The Supreme Court of Washington, in a 1978 tenure case involving a private college,[11] stated that "private action is immune from the restrictions of the 14th amendment" and the court "found nothing in the record to support a claim that the actions of this private institution include 'state action.' The court did not foreclose the possibility that there may be sufficient intertwining of private institutions and governmental functions to constitute state action . . . there simply was no proof in this case." The Court held that the college had acted properly in dismissing a tenured professor by adhering to its own faculty code governing such cases.

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[9] Berrios v. Inter American University, 535 F.2d 1330 (1st Cir. 1976).

[10] Krohn v. Harvard Law School, 552 F.2d 21 (1977).

[11] Lehmann v. Board of Trustees of Whitman College, 576 P.2d 397 (Wash. 1978).

Earlier, in an action by a nontenured Boston College instructor who claimed that he was denied due process when his contract was not renewed, the federal district court ruled that the college was not engaged in state action although it enjoyed tax exempt status, was chartered by the state, and received one percent of its income from state grants and contracts. Therefore, the college was not subject to a cause of action under the Civil Rights Act of 1871.[12] The court noted that its finding was consistent with previous First Circuit cases.

Even complete funding by the government does not necessarily create state action. In the case where a research professor was dismissed from a federally funded research project, the university was held not to be involved in state action since the federal government exercised no managerial function.[13]

In a similar case, the court held that a private university under contract to teach government employees at a government facility was not engaged in state action when it dismissed an English instructor.[14] It is important to note that in both cases the courts pointed out that race discrimination was not involved.

In an earlier decision[15] that is now before the Supreme Court, the Seventh Circuit held that the "state action requirement of the Civil Rights Act of 1871 (Section 1983) requires a showing of some nexus between the state and the challenged conduct . . . the government involvement necessary to meet the state action requirement . . . must be affirmative support measured by its direct contribution to the conduct at issue."

This distinction between state and private action resulted in an interesting ruling by the Eighth Circuit regarding the actions of a private college under the federal bankruptcy act. In this 1977 case,[16] graduates who did not repay their NDEA loans filed bankruptcy papers listing the college as an unsecured creditor. The two students owed $1500 and $1900 respectively. They both requested transcripts to be sent to graduate schools which the college refused to do, basing its action on a college regulation published in the college handbook which stated that "no transcript is released until all accounts are paid." The students sued claiming that the college was in violation of the federal bankruptcy act. The court based its decision upon a motor vehicle case[17] involving the bankruptcy act and Arizona's version of the motorist financial responsibility law, in which the United States Supreme Court held that the state statute was inconsonant with the bankruptcy act and invalid under the Supremacy Clause of the U.S. Constitution. Citing Perez and other cases dealing with unlawful actions of municipalities under the bankruptcy act, the Court held that these case make it illegal for state and local government to use its machinery against bankrupt individuals but it is not illegal for private parties to take action which does not involve machinery of the states. "The Bankruptcy Act as it is now written," said the Eighth Circuit, "does not prohibit a private college from refusing to furnish transcripts to persons who have received a discharge in bankruptcy of their college loans."

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[12] Laventzen v. Boston College, 440 F. Supp. 464 (1977).
[13] Wahba v. New York University, 492 F.2d 96 (1974).
[14] Greenya v. George Washington University, 512 F.2d 556 (1975).
[15] Cannon v. University of Chicago, 559 F.2d 1063 (1976).
[16] Girandier v. Webster College, 563 F.2d 1267 (8th Cir. 1977).
[17] Perez v. Campbell, 402 U.S. 637 (1971).

One judge, in a concurring opinion, took exception to the rationale which would permit a private college to refuse to furnish transcripts while a public institution may not. His prediction was not long in coming. In March of this year the U.S. District Court for New Jersey held that Rutgers, as a state university, could not withhold a transcript or refuse to permit the student to return to the university.[18] The Court used the logic of the Girandier case.

EQUAL OPPORTUNITY ACT

The 1972 amendments to Title VII of the Civil Rights Act of 1964, popularly known as the Equal Opportunity Act, removed the exemption of educational institutions. Individuals claiming employment discrimination based on race, color, religion, sex or national origin do not have to prove that a private college is engaged in state action and seek redress under the due process clause of the 14th amendment or Section 1983 of the Civil Rights Act of 1871. They may also bring suit under state antidiscrimination statutes. For example, New Jersey law declares as a civil right the opportunity of all persons to obtain employment without discrimination because of sex

In Title VII cases the burden (to establish a prima-facie case) is on the one bringing a charge of discrimination. The U.S. District Court for Massachusetts[19] held that for a plaintiff to establish a prima-facie case he must prove:

a. he belonged to a *protected* minority.
b. the procedure followed by the college was irregular.
c. he was as qualified in accordance with the college's standards as other candidates (who did receive tenure that year).
d. he was a candidate (for tenure) and despite his qualifications he was denied it.

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[18] Handsome v. Rutgers University, 445 F. Supp. 1362 (1978).

[19] Huang v. Holy Cross, 436 F. Supp. 639 (1977).

In this case an *ad hoc* committee had recommended tenure. After receiving the committee's report the President received a letter from a faculty member outside the candidate's department urging denial or tenure. The letter was extremely critical of the candidate's service as a faculty member at the college. The executive committee of the board denied tenure on the grounds that:

1. there was a lack of evidence that the plaintiff's teaching was of the quality to justify a tenure appointment.
2. there were doubts about his quality of departmental service in curriculum development and faculty recruitment.

The court held that the dismissal had no basis in race and held for the college even though information in the letter was injected into the tenure process that was not part of the college's procedure for the granting of tenure. If this had been a public college, a question of procedural due process would most likely have been raised.

It appears from an examination of the cases that the courts will not hold private institutions to full procedural due process in Title VII cases. In a recent case involving alleged sex discrimination, a U.S. District Court in Pennsylvania stated that, "all a court can do is determine whether reasonable good faith was shown and fair consideration was given . . . if criteria used and procedures followed were reasonable and rationally related to decision reached, court has gone as far as it can go." Further, the Court said that it was not "a super tenure committee to pass on qualifications for and grants of tenure in colleges and universities."[20] In this case the university had used peer evaluation, and quality of research and teaching as judged by students and faculty. The court held for the university.

In another race discrimination case under Title VII, a private college that had failed to renew a black teacher's contract was held to have acted in good faith and fairly. The District Court stated, and the appellate court affirmed, that "the history of the college clearly refutes any possible inference of anti-black bias."[21]

Though discriminatory actions of a college prior to the effective date of the Equal Opportunity Act are not actionable, the Supreme Court has commented on the employment history of an institution and its relation to a current charge of discrimination. The court said: "proof that an employer engaged in . . . discrimination prior to the effective date of Title VII (March 24, 1972) might in some circumstances support the inference that such discrimination continued particularly where relevant aspects of the decision making process had undergone little change."[22]

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[20] Johnson v. University of Pittsburg, 435 F. Supp. 1328 (1977).
[21] Mosby v. Webster College, 563 F.2d 901 (1977).

The 1972 amendments to the Civil Rights Act of 1964 have also raised the specter of class action suits and their attendant expenses and involvement of university staffs. In the First Circuit, Brown University's appeal of the district court's grant of class action certification was dismissed for lack of appellate jurisdiction. However, the circuit court did comment on the heavy litigation expenses that would be passed on to students and that the involvement of every department (Brown asserted that it had a decentralized system) in fact finding and defense may be disruptive of the university's mission.[23]

The courts recognize two types of discrimination under Title VII.[24]

1) disparate treatment, where the employer treats some people less favorably than others because of race, religion, sex, etc.
2) disparate impact, which involves employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity.

Under the disparate treatment theory proof of discriminatory motive is critical whereas under disparate impact theory proof of discriminatory motive is not required.

A class action suit brought by a female assistant professor against Swarthmore College claimed that the college was guilty of disparate treatment of female faculty members.[25] The court held that it is the plaintiff's burden to establish not only the existence of the disparate treatment but also that such treatment was caused by purposeful or intentional discrimination.

Much statistical evidence as presented by both sides as well as testimony of female faculty members. In commenting on such testimony the court said that "they would have to show more than the mere fact that they were not hired, promoted, renewed, tenured, etc. They must demonstrate that the alleged discrimination did not result from the most common legitimate non-sexist reason on which Swarthmore might deny a female faculty member a promotion, renewal, and tenure—an absolute or relative lack of qualifications . . . ." In considering the evidence, the court held that there was no evidence of discrimination against the plaintiff or class.

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[22] Hazelwood School District v. United States, 97 S. Ct. 2736 (1977).
[23] Lamphere v. Brown University, 553 F.2d 714 (1st Cir. 1977).
[24] International Brotherhood of Teamsters v. United States, 97 S. Ct. 1843 (1977).
[25] Presseisen v. Swarthmore College, 442 F. Supp. 593 (1977).

The extensive statistical analysis presented by the college and the plaintiff would indicate that such statistical evidence will continue to be a major technique of proof in such cases. The court noted that statistics are an important source of proof in discrimination cases but the usefulness of statistics "depends on all of the surrounding facts and circumstances."

The level in the university at which the salary and promotion decisions are made appears to be significant. In a class action suit brought by female teachers at Yeshiva University,[26] the U.S. District Court refused to exclude department heads from charges, commenting:

> . . . since promotions and salaries appear to be substantially a function of department needs, they may well be necessary parties to the fashioning of any type of relief, if relief is appropriate. Moreover, if employment discrimination exists at the college, it may not be the result of a university or college policy, but rather that of just certain department heads who, given relative freedom of action, are expressing their own personal biases.

Title VII cases do not impose procedural due process requirements upon private colleges in their dealings with employees. A review of the cases would indicate only that private colleges must be able to answer a charge of discrimination. If a plaintiff is able to establish a *prima facie* case of discrimination, the college must be able to show that legitimate reasons were present which would support the action taken.

Finally, Title VII does permit the hiring of persons on the basis of religion, sex or national origin when such a characteristic is a "bona fide occupational qualification necessary to the normal operation of that particular business or enterprise." Educational institutions may hire persons of a particular religion if the institution is "owned, supported, controlled or managed" by a particular religion or if the institution's curriculum "is directed toward the propagation of a particular religion."[27]

CONTRACT

While students at public colleges and universities may claim property rights under the due process clause of the 14th amendment, students at private colleges often base their rights of action on contract. For example, a student brought suit against Emory University[28] for breach of contract based on the school's published guarantee of due process prior to dismissal. The university bulletin stated that, "Attendance at Emory is a privilege and not a right; however, no student will be dismissed without due process." Elsewhere in the bulletin it stated:

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[26] Sobel v. Yeshiva University, 438 F. Supp. 625 (1977).

[27] 42 U.S.C. § 2000e - 2 (e) (2).

[28] Jansen v. Emory University, 440 F. Supp. 1060 (1977).

> At the close of each teaching period and at any other time felt necessary, chairmen of various departments evaluate the progress of each student and his ability to meet the standards of the School of Dentistry. All decisions related to promotion, graduation and certain disciplinary measures come from recommendations by the faculty and the dean. At any time the president or the dean may terminate the enrollment or impose such measures as may be considered appropriate for improper conduct or for lack of sufficient progress.

The federal court in Georgia pointed out that this statement controls the general guarantee of due process and that under Georgia law courts are to interpret contracts as a whole. But in addition, the court reemphasized the Fifth Circuit recognition that "educational contracts have unique qualities and are to be construed in a manner which leaves the school sufficient discretion to properly exercise its educational responsibility."[29]

In comparing Emory to a public institution with regard to due process, the court stated that, "the relationship between a citizen and the state . . . was quite distinct from that shared by students and private institutions. There is no basis for suggesting either that Emory, a private university is subject to the (due process) restraints imposed on state institutions or that it meant to so bind itself."

In another 1977 case, a student brought suit against a private college and its dean for breach of contract for the dean's failure to change a grade from an "F" to an "incomplete" upon the recommendation of a faculty appeals committee. This action prevented the student from being reinstated. The plaintiff argued that the student manual made the recommendation binding upon the dean. The plaintiff's contract theory was that the Student Manual and Academic Information booklet constituted a contract between the student and the college and that the dean's failure to follow the committee's recommendation was a breach of this contract. While generally accepting the plaintiff's theory, the appellate court reversed the trial court's ruling that converted the recommendation of the committee into a mandatory order for the dean.[30]

In another student dismissal case decided in March of this year, a

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[29] Mohavongsana v. Hall, 529 F.2d 448 (1976).

[30] Lyons v. Salve Regina College, 565 F.2d 200 (1977).

New York court[31] held that the implied contractual agreement between a student and a private college "only obligated the school to act unarbitrarily and in good faith on knowledge derived from the faculty's experience, observations and expert evaluation . . . ." The court concluded that the school handled the situation with "sensitivity and fairness" though no written notice of hearing was given.

The court also commented on the college's obligation to other students. "The contractual obligation of the school to other students," stated the court, "requires that the college provide an atmosphere conducive to learning which enables the faculty to teach and permits students to engage in the advancement of knowledge, free from external pressures, interference and disturbances. It follows that the school could not contractually perform their obligations to the rest of the student body if plaintiff were allowed to continue attending classes."

However, courts will hold a private college (and public college for that matter) to do what it says it will do in its publications. In a recent case decided by the Supreme Court of Illinois[32] the court held the college liable for breach of contract. In this case the school published in its brochure that applicants would be evaluated on the basis of:

1) potential for study and practice of medicine;
2) Medical College Admission Test results;
3) personal appraisals by pre-professional advisory committee;
4) personal interview if requested by Admissions Committee.

The plaintiff, a rejected applicant, argued that the school failed to judge him on these criteria but on the ability of his family to give large sums of money to the school. The court held that the school's acceptance of student's application and a $15.00 application fee constituted an "acceptance of an offer to apply" and failure to evaluate his "application according to criteria other than those stated in the brochure gave rise to a cause of action for breach of contract . . . ."

A unique, though unsuccessful, suit against a private college for breach of contract was decided by the Supreme Court of Washington this year.[33] A former student sued a Massachusetts college in the state of Washington claiming that he was "induced to enroll in college by false representation and that the college was guilty of breach of contract in failing to provide a satisfactory program of assistance for persons with his learning disability." The student investigated the eastern college at the suggestion of a public school employee who had heard a part-time faculty member for the college speak in the state on learning disabilities. The speaker reported that Curry had a program for students with dyslexia. The student sent for the college catalog and articles describing the program for dyslexic students. The student enrolled but did poorly and did not return for the spring term. The court dismissed the action stating that the college's response to an inquiry by sending its catalog and other material did not constitute consummating a transaction in the state as required for suit under its long-arm statute.

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[31] Tedeschi v. Wagner College, 401 N.Y.S.2d 967 (1978).

[32] Steinberg V. Chicago Medical School, 371 N.E.2d 634 (1977).

[33] Lewis v. Curry College, 573 P.2d 1312 (1978).

While the contract issue was not directly addressed, the case points up the need for care in writing and circulating program descriptions and also the need to clear representatives of the college. What would have been the outcome, for example, if the speaker was an admissions counselor or was an official representative of the college and had been furnished by the college's speakers bureau? What if a faculty member was representing the college at an education meeting? This case leaves a number of unanswered questions.

COLLECTIVE BARGAINING

Another distinction between public and private colleges is made in the area of labor relations. As a private entity, a private college comes under the jurisdiction of the National Labor Relations Board. This jurisdiction was judicially confirmed in a 1975 case in which the court held that Wentworth Institute was required to bargain collectively with a NLRB certified faculty group.[34]

The most significant case in the collective bargaining field this year for private colleges was the Yeshiva University case which is presently on appeal.[35] Yeshiva refused to bargain with a faculty union and argued successfully before the U.S. Court of Appeals for the Second Circuit that full time faculty at Yeshiva are managerial and/or supervisory employee's within the meaning of the National Labor Relations Act and were therefore excluded from the Act's coverage. The court examined at great length the operation and governance of the university, the role of the faculty at Yeshiva and the role of supervisory staff under the act. Under the National Labor Relations Act a supervisor is defined as:

> . . . any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or

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[34] NLRB v. Wentworth Institute, 515 F.2d 550 (1975).

[35] The case has been reported widely in the educational press and the full text of the opinion was given in the Chronicle of Higher Education (Aug. 14, 1978).

> responsibility to direct them, or to adjust their grievances, or to effectively recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment. It is well settled in the industrial context that possession of any one of the enumerated powers in section 2 (11) or the power to effectively recommend with respect to any one of them is sufficient to satisfy the statutory definition of a supervisor.[36]

The court set forth in great detail the organization and involvement of the faculty in Yeshiva's six undergraduate colleges and four graduate schools and found that the record, "... strongly supports the contention of Yeshiva that its full-time faculty, acting at times through committees or department chairmen, and at other times as a body, exercises supervisory and managerial functions ...."

The National Labor Relations Board justified its holding that Yeshiva faculty were employees under the Act on the basis of four points. The court responded to and rejected each. The NLRB argued that the full-time faculty act only as professional employees. The court stated that the fact that an individual was a professional employee did not preclude him from being classified as a supervisor or managerial employee. The court stated that,

> ... the issue as we perceive it in this case involves not simply the professor's exercise of discretion in conducting the courses he is employed to teach. Rather, the issue here is the extensive control of Yeshiva's faculty over what courses are taught in the institution, who teaches them, the number of teaching hours required of the faculty, and the rank, salary, and tenure status of other faculty members. We are further concerned by the crucial role of the full-time faculty in determining other central policies of the institution including the curriculum, admissions and graduation requirements, tuition, and in one instance, even the situs of a school. When faculty members have such power—as the record indicates they do at Yeshiva—they no longer are simply exercising individual professional expertise. They are, in effect, *substantially* and *pervasively* operating the enterprise ....

The next argument of the board was that the full-time faculty acts collectively. The court stated that there as no "individual" statutory restriction in the board's own concept of managerial employees and that many managers operate as a team.

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[36] NLRB v. Yeshiva University (2d Cir. 1978).

The board also argued that the faculty acted on their own behalf and not in the interest of the employer. The court responded to this argument by again going to the record,

> . . . looking at the record one cannot escape the conclusion that even assuming that the faculty's determinations on personnel, curriculum, admissions, grading, graduation requirements, and other policy issues were motivated by the faculty's own best interests, the fact that the administration and Board of Trustees of Yeshiva so rarely interfered in the faculty decisions indicates that the interests of the faculty and of the University were almost always co-extensive . . . . Certainly the deans whom the Board found to be supervisory or managerial displayed a remarkable degree of acquiescence and often went so far as to proclaim their identity of interest with the faculty. The full-time faculty as a whole or through committees have not in fact acted simply in an advisory capacity, nor have they merely made recommendations which were accorded substantial weight; their decisions on major policy issues have, for the most part, proved definitive. Our review of the record leads us to conclude that at Yeshiva University, . . . 'The Faculty is the School.'

The final arguement of the NLRB was that the faculty was subject to the ultimate authority of the Board of Trustees. The court found this argument particularly unconvincing since the president, the vice president and deans of Yeshiva were also subject to the ultimate authority of the board and this did not keep this group from the ranks of management.

In finding for Yeshiva, the court commented on the National Labor Relations Act itself and stated, "It is clear that the Congress, when it amended the Act in 1947, had no contemplation that it would be applied to professional faculties in private institutions of higher learning. Their governance is unique and has no counterpart in the commercial business models the Act was designed to regulate."

This case has stirred up a great deal of controversy and has been criticized by union and professional association leaders. But does it give the private college a weapon (should it want to use one) against faculty unions? Judge William Mulligan, the writer of the opinion of the court, has stated quite clearly that the court had limited itself solely to the situation at Yeshiva. Colleges which do not have the history of governance as found at Yeshiva would have some difficulty arguing that their faculty are managerial. Even if the college had a faculty Senate and many faculty committees, such practices would not place the faculty in managerial roles. The test of the Yeshiva court appears to be the type of "managerial decisions" made by the faculty and the acceptance of these decisions by the administration and the board of trustees.

It is quite common for the faculty to recommend curriculum programming, admission standards, and graduation requirements. it is less common for the faculty to make such administration decisions as faculty load, faculty salaries, and tuition. These latter have a far greater budgeting effect than the former though the former are not without their financial impact. Also in most institutions as is the case of Yeshiva, the faculty is in the position of recommending policy. While at Yeshiva there was "a remarkable degree of acquiescence" to faculty recommendations, a lack of such acquiescence at another institution might establish a stronger employee/employer relationship in the eyes of a court.

Two other recent collective bargaining cases which deal with private colleges are worthy of mention. Both deal with the question of members of religious orders as members of bargaining units and were decided within a month of each other. In the Second Circuit[37] the court held that a faculty member who belonged to a religious order could not be excluded from the bargaining unit when the religious faculty was on the same salary scale as lay faculty and the religious order had relinquished title to the college, including its buildings, and was a minority on the board of trustees. The court disagreed with the NLRB that the practice of the order giving funds derived from the salaries of its members was a "kickback." It was a pure gift since there was no obligation to return any funds.

In the second case[38] the NLRB excluded the religious faculty because they did not share a community of interest with the lay faculty. Again the college and the religious order were separate legal entities and again the court noted that religious faculty were hired by the college on the same basis and procedure as the lay faculty. They were not assigned by the religious order. The court stated that the religious faculty shared a community of interest with the lay faculty and that in fact the record showed that "the religious faculty were independent thinking individuals and are not under the domination of the college's Franciscan Administration."

The court referred to the NLRB's ruling concerning Seton Hill College[39] where the board had not permitted the sisters to become part of the bargaining ring because

> the sisters owned and administered the college (college was separately incorporated and was leased from the order for $1.00 per year);
>
> the college had 34 lay faculty and 58 sisters;
>
> the sisters were referred to the college by the Mother General and hired by the President, also a sister;

salaries were paid to the order for the sisters and a fixed amount returned to the college;

the sisters did not participate in the college's medical insurance, life insurance, and annuity plans.

The NLRB found that these differences meant that the sisters did not share a community of interest with lay faculty. The board also held that the sisters were "also in a sense part of the employer."

The collective bargaining issues raised in the Yeshiva decision and the cases involving religious faculties are far from settled. The faculty/management issues addressed in Yeshiva most likely will be considered by the U.S. Supreme Court. If the Second Circuit is upheld the guidelines established have provided a high standard for many private colleges to meet.

The issue of religious faculty as part of bargaining groups at religious institutions must address the questions raised in the cases reported. A case by case approach is probably forthcoming since the attitude of the lay faculty at a particular institution would have an effect on possible litigation.

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ED 170 848

14

Problems of School Board Attorneys

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Those of us who practice school law do so in a variety of different circumstances. Some of us represent one school district; others represent many school districts. We represent school districts ranging in size from a handful of students to tens, if not hundreds, of thousands of students. Some of us are in private practice with school law being only a small part of that practice. Others are in private practice specializing exclusively in school law. Some of us are employees of the school district which we represent while others may represent school districts by virtue of their employment by a school boards association or a state or county educational agency.

What I thought I would do is take a few minutes to discuss the practice of school law from my perspective, which is as house counsel to a large urban school district. The San Diego City Schools has approximately 120,000 students this year with enrollment declining at the rate of approximately 2,000 students per year. The school district is the second largest in California and twelfth or thirteenth largest school district in the country. It serves the ninth largest city in the country.

The attorney for the school district in San Diego has for many years been called the "Schools Attorney." The job is compensated at the assistant superintendent level. There is an assistant schools attorney, which is a director-level position, and a deputy schools attorney, who is compensated at a somewhat lower level. In addition, we make use of unpaid interns from two local law schools. In any large organization, reporting relationships are, of course, crucial. On an organization chart my position is shown as reporting both to the board of education and to the superintendent. As a practical matter, the legal services function is under the administrative direction of the superintendent while matters of legal policy are determined jointly by the superintendent and the board of education. This joint reporting relationship has enhanced the position that we have always taken to the effect that the attorney for the school district has an attorney-client relationship with the board of education as an entitiy as well as with each member of the board.

The office of the schools attorney provides the full range of legal services to the school district and its staff, including the preparation and conduct of litigation and administrative law proceedings; the rendering of written and oral legal opinions; the preparation or review of all contracts, rules, and regulations and other legal or quasi-legal documents, the preparation of all documents incident to the notice, call and conduct of tax override and school bond elections; and the provision of in-service education for the staff. Legal assistance is provided in the drafting of proposed legislation and in the analysis of pending bills. Legal advice is also provided to the staff with respect to the need for legislation to solve specific problems. We are readily accessible to all levels of district staff from board members and the superintendent on down. Of course, legal assistance is provided only within the scope of the employee's responsibilities.

Until recently very limited use was made of outside counsel; however, within the last two years the school district has become partially self-insured with respect to tort liability and totally self-insured for workers compensation. In each of these areas the district has retained specialized private counsel. Coordination with private counsel is through the office of the schools attorney.

Probably the area of greatest difference between private counsel and counsel employed directly by a school district is the extent of involvement in the school district's day-to-day affairs. I attend all public and executive sessions of the school board and serve as one of the eleven members of the superintendent's executive council or cabinet. Almost a third of my time is spent in attending meetings of various kinds. A collateral duty of the schools attorney is to serve as assistant secretary of the board of education. In that capacity I am authorized to accept service of process on the school district and I am also responsible for the preparation of notices of all meetings of the board, supervising the keeping of the board's minutes, acting as custodian of the official records of all policy actions of the board and supervising the periodic revision of the rules and regulations of the board.

There are obviously advantages and disadvantages to the close relationship which exists with members of the board of education and the senior administrative staff of the school district when one serves as house counsel. One of the obvious advantages to the client lies in the ability to practice "preventive law." By being involved in the formulation of policy and by being very familiar with various aspects of the operation of the district, one is often able to call attention to potential legal problems at a very early stage.

More difficult problems arise in two other areas. The first is the separation of legal determinations from policy determinations. The second has to do with the identity of the client in a particular situation.

Most lawyers must, on occasion, deal with the client who under the guise of seeking legal advice wants the lawyer to make the client's decisions for him. This is the type of client who, if the law says that teachers must remain on campus until 3:00 p.m. on school days, will call at 2:45 p.m. and ask if teachers can leave. Similarly, we have all had clients who, when faced with alternative courses of action, each of which has advantages and disadvantages, asks, "What should I do?" With such clients, it is relatively easy for the school lawyer to avoid making the policy decision.

It is much more difficult to deal with the subtle involvement in policy determinations that seems to arise naturally from simply being present and being close to the board members, the superintendent, and other senior staff members. The matter is complicated by the fact that in any large organization there are currents, cross-currents, and, perhaps, whirlpools. Thus, the expression of an opinion by the school district's attorney on an issue will be appreciated by those who are in agreement with the opinion, expressed and resented by those who disagree. Skilled players of the bureaucratic game have an amazing ability to casually mention an issue, solicit one's views, and later state that the matter has been reviewed with the school district's attorney who is then said to be in complete agreement with the position advocated.

The tendency to find ways to bring the school district's attorney in on one side or the other of an issue is encouraged by the fact that the attorney—despite the Gallup Poll—often has a high degree of credibility among board members, with the superintendent, and with the community. For one thing, the attorney is not a professional educator. Thus, when professional educators disagree, the side that can get the attorney to agree with them is able to say, "Look, even this intelligent, well-educated, impartial pillar of the community agrees with us. He must be right." Of course, the other camp is left to say, "What the hell does he know? He has never been a teacher, a counselor, a vice-principal, a principal, a coordinator, a director or done anything that would give him insight into the problems educators face."

For these reasons, house counsel for a school district make frequent use of such phrases as, "On the other hand," "It can also be argued," "Reasonable people could come to either conclusion," and "Have you talked to ____________ about this?" In a somewhat different context, it has been said that seduction can be sweet. It is indeed seductive—not to mention ego satisfying—to be asked to express opinions on a wide variety of subjects. Nevertheless, there are numerous occasions when a cold shower rather than expressing an opinion is the wiser course of action. Of course, there are many areas where the rendering of appropriate legal advice cannot be separated from advising on policy matters. Justice Powell in his dissent in *Wood v. Strickland,*[1] gives one example when he suggests that reliance by school board members on the advice of counsel on questions involving the constitutional rights of students, is evidence of good faith sufficient to avoid the imposition of personal liability for violations of the Civil Rights Acts. An assessment of the legal risks in connection with alternative courses of action can also often involve the attorney in policy decisions. No attorney, including house counsel, can expect to retain clients if that attorney is a naysayer rather than solution-minded. A negative mindset is inconsistent with the role of legal counsel for a public agency. The attorney's job is to tell the client how it can accomplish its objectives. The more familiar the lawyer is with the client's problems and goals, the more aware the lawyer is of the client's various commitments, the more the lawyer knows of what has transpired in the past and what is to come in the future, the greater is the lawyer's ability to provide meaningful legal guidance.

The other area that presents special concern to house counsel for a school district revolves around the question, "Who is the client?" The longer house counsel is employed by a school district, the murkier are the origins of his employment. The membership on boards of education changes, superintendents either come and go, or stay, resulting in the establishment of close relationships that are almost inevitable, after working together on a day-to-day basis for many years. When relations between the board and the superintendent are good, the question of whether the board or the superintendent is the client does not arise. However, it is during such periods that events may occur that will lead to problems in the future. For example, the board may direct the attorney to work with the superintendent in revising the superintendent's employment agreement. The superintendent, naturally, expects an agreement to be drawn which will provide him with the maximum protection. Very likely the board has not given that question much thought. Some time later, after there has been a falling out between the board and superintendent, what is the attorney's role in interpreting the contract which was drafted in a completely different climate?

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[1] 420 U.S. 308 (1975).

The question "Who is the client?" can arise in other contexts as well. For example, assume that a district has a contract with its employee unions that provides for advisory arbitration with the final decision on all grievances to be made by the governing board. The employee will have an attorney furnished by the union. In the hearing before the board, does the school district's attorney represent the superintendent or other administrators or does the attorney advise the board? Is it a conflict of interest for the attorney to do both? The superintendent or other administrator may not be pleased at the prospect of being unrepresented in the proceedings. This is particularly true if the union attorney seeks to turn the proceedings into a trial of the responsible administrator. Although there have been some recent cases upholding school district attorneys serving both as prosecutors and advisers to the governing board, it is not a comfortable position in which to find oneself.

There are obviously no neat solutions to these problems. When relations between the board and the superintendent are cordial, the attorney's problems are minimal. When that relationship is somewhat strained, but short of being hostile, considerably more adroitness is required. Under these circumstances the best advice may well be the less the attorney says the better off he or she is. When the ultimate break between the board and the superintendent comes, it is clear that the attorney is responsible to the majority of the board.

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15

Educational Malpractice: A Contemporary View with an Eye Towards the Future

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> The science of pedagogy itself is fraught with different and conflicting theories of how or what a child should be taught, and any layman might—and commonly does—have his own emphatic views on the subject. The "injury" claimed here is plaintiff's inability to read and write. Substantial professional authority attests that the achievement of literacy in the schools, or its failure, is influenced by a host of factors which affect the pupil subjectively, from outside the formal teaching process, and beyond the control of its ministers. They may be physical, neurological, emotional, cultural, environmental; they may be present but not perceived, recognized but not identified.[1]

The multiplicity-of-factors argument set forth above provided the reasoning for denial of the claim of one Peter Doe that the San Francisco Unified Schools had failed to provide him with an adequate education to function as an adult in today's society. The date was September 29, 1976. More than a full two years later the issue, supposedly buried by that California case, continues to arise to cast its pall over an educational system which is increasingly being held accountable by a public which is tired of excuses.

Indeed, the competency movement, now in vogue, may be the force which will rewrite pedagogic theory in a way which educators may come to dread. Once standardized in theory, it will be very difficult to "unstandardize" or innovate in fact. The courts cannot be expected to hold the line forever in defending the system of education as it now exists. Educators must put their own houses in order before the public comes to brick them up in their own self-constructed tombs of excuses.

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[1] Peter Doe v. San Francisco Unified School Dist., 131 Cal. Rptr. 854 (Ct. App. 1976) at 860-61 (sometimes cited as Peter W.).

The purpose of this chapter, is to examine the developing concept of educational malpractice since the mid 70's, and what has happened as an aftermath of *Peter Doe v. San Francisco Unified School District.*

SOME SOCIETAL PERCEPTIONS

There exists no shortage of "experts" in this day and age who are willing to tell you what is wrong with the educational system of the United States. One of the most popular arguments of the "experts" is the laying of blame at the doorsteps of the teachers and administrators. Dr. Max Rafferty, Dean of the School of Education at Troy State University, explains that "We had to recruit thousands of people into teaching who . . . were novices, or people who were in some cases, misfits who decided to try their luck at teaching."[2] Dr. James Keener, author of "The Miseducation of American Teachers," holds that not only teachers, but administrators are, on the average, lacking in intelligence and level of educational achievement.[3] Other experts say that the downgrading of teaching the three R's to make school more "fun" only succeeded in hammering another nail into the coffin of American education. Kathyrn Stilwell, past president of the New Jersey Education Association, blames TV for the lack of kids' interest in reading.[4] The list seems endlessly misdirected away from the harsh realities of solution toward the curious concept that society somehow has to latch itself to the past when kids did learn and rules were stricter. Frustration often brings retreat to a simpler time when everything was much more of a world of clearcut choices and responsibilities were easier to "fix." Responsibility seems to evoke a defensive stance by the education community today because the community fears to "guarantee" that over which it does not feel culpable.

As such, the public has assumed the responsibility which the schools have so willingly abdicated and is now turning that responsibility back to the schools in the form of minimum competency testing—an aftermath of the public's new demand for accountability.[5] Representative

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[2] Smith, *America's Education Mess*, The National Enquirer, Sept. 26, 1978, § 1 at 46.

[3] *Id.* at 46.

[4] Klein, *Why Teachers Find It Tougher Than Ever To Educate Youngsters*, The National Enquirer, Sept. 26, 1978, § 1 at 46.

[5] *See* Fields & Harris III, *Educational Malpractice and the Public Demand for Teacher Accountability*, Planning and Changing, Spring 1978, at 3.

Ronald Mottl (D. -Ohio) feels that the whole of America needs a standard competency test in every school at every level "to reverse the alarming decline in the level of education."[6] Mottl has gone so far as to introduce an amendment to an education bill in Congress to set up such a series of tests to insure that every graduating student "is qualified to carry on in life and able to fully function."[7]

Even the diplomas handed out to the students are being labeled as a form of consumer fraud because they only attest to the possibility that the students are allegedly reading on an eighth-grade level.[8] A current survey conducted by the National Assessment of Educational Progress indicated that one out of every eight high school graduates cannot even read a simple traffic sign.[9]

The schools, in defense, have attempted to counter their critics by releasing standardized test scores to the public so that the public may judge the performance of the teachers. In a 1977 survey, the National Education Association polled their members concerning these tactics and found that 75% of those surveyed felt that this practice had either no effect or a negative effect on teaching.[10] Little wonder that NEA has gone on record to urge the elimination of this use of group standardized scores.

MALPRACTICE SUITS

The concept of malpractice is rather new and ill-defined in its application to education. The definition may variously be taken as "any professional misconduct, unreasonable lack of skill or fidelity in professional . . . duties, evil practices, or illegal or immoral conduct."[11] to "violation of a professional duty to act with reasonable care and in good faith without fraud or collusion."[12] *The University of Pennsylvania Law Review* points to the fact that there are no firm laws in the area of educational malpractice and that the doctrine will have to be established piecemeal through decisions in tort and contract law which are analogous to the laws pertaining to professional malpractice.[13]

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[6] Smith, The National Enquirer, *supra* note 2 at 47.

[7] *Id.*

[8] Hentoff, *Childhood Education: The Great Consumer Fraud*, 201 Current, March 1978, at 3.

[9] *Id.* at 4.

[10] *Member Opinion Poll: Accountability For Teachers*, 66 Today's Education, Sept./Oct. 1977, at 23.

[11] Black's Law Dictionary (4th ed. 1968).

[12] Ballentine's Law Dictionary (3rd ed. 1969).

[13] Barnes, *The Spectre of Academic Malpractice*, Change, May 1978, at 10.

Legal researchers Rennard Strickland and Janet and William Phillips feel that academic malpractice suits fall under the concept of "educational jurisprudence"—an interpretation of the *in loco parentis* status of teachers in which the teacher acts for the benefit of the students during the time that they are under his supervision.[14] The argument then continues that the parents of the child might then sue the teacher if the child fails to develop academically and the teacher causes the child to suffer "irreparable damage."[15] Thus far, the courts have failed to adhere to this argument in their rulings. Thus, the litany of cases reflecting educational malpractice suits is rather short.[16]

The 1976 case of *Peter Doe v. San Francisco Unified School District* was an attempt to prove that an entire school system was negligent for allowing a student to progress through twelve years of schooling only to emerge without the ability to pass an eighth-grade test as specified in the Education Code. The student was not a discipline problem, had exhibited no learning problems, and was in regular attendance at school. The school even informed the mother, upon inquiry into her son's reading ability, that it was not much below the school's average.[17] The youth had to seek special tutoring to gain sufficient reading skills to function in society upon graduation. The suit sought $500,000 in damages resulting from the negligence of the school in following its "duty of care" to be certain that students attained basic academic skills.[18]

The suit was dismissed at both the trial and superior court levels on three grounds. Doe had failed to state the specific cause of action for the contention that there was negligence involved through misrepresentation. Doe could not state his case with the particularity required by California statute.[19] Secondly, to hold a school district accountable for a "duty of care" in academic matters would simply result in countless nuisance suits claiming torts, real or imagined—a situation not in the public's best interests.[20] Third, the definition of what constitutes the science of pedagogy has not been settled; hence, the term "malpractice" attached to it is indefinable.[21]

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[14] Newell, *Teacher Malpractice: A New Threat To Education?*, American Educator, Summer 1977, at 4.

[15] *Id.*

[16] *See, e.g.*, public school education: Frederick v. Thomas, 408 F. Supp. 832, 419 F. Supp. 960 (1976); Peter Doe v. San Francisco Unified School District, 131 Cal. Rptr. 854 (1976), and higher education: Trustees of Columbia University v. Jacobsen, 31 N.J. 221, *aff'd., 53 N.J. Super. 574, 148 A.2d 63, appeal dismissed*, 31 N.J. 221, 156 A.2d 251 (1959), *cert. denied*, 363 U.S. 808 (1960); Huckabay v. Netterville, 263 So. 2d 113 (La. App. 1972); Payner v. New York University, 66 Misc. 2d 92, 319 N.Y.S.2d 893 (App. 1971); Zumbrum v. University of Southern California, 101 Cal. Rptr. 499 (1972); Ianniello v. University of Bridgeport, Chronicle of Higher Education, November 24, 1975; Slaughter v. Brigham Young University, 514 F.2d 622 (10th Cir. 1975); Lyons v. Salve Regina College, 422 F. Supp. 1354 (D. R.I. 1976), and Connelly v. University of Vermont, 244 F. Supp. 156 (D. Vt. 1965) to name a few.

[17] Peter Doe v. San Francisco Unified School District, 131 Cal. Rptr. 854 (1976), at 856, 862.

[18] Cal. Gov't Code § 815.2 (a).

[19] Peter Doe v. San Francisco, at 855.

The failure of this suit has not deterred others from trying their luck—all with the same disappointing results. The parents of Edward Donohue, a 19-year-old graduate of Copiague High School sued the Long Island school system for $5 million in January of 1977 because the system had failed in its legal obligation to educate their son. The youth's attorney contended that the school district "had no right to give him a diploma in the first place. He cannot read above the fourth-grade level."[22]

The suit was dismissed in September of 1977. The justice dismissing the suit, Paul J. Baisley, did recommend, however, that the case be reviewed by a higher court "because so many educators across the country were interested in it and the issue it raised."[23] The grounds for the dismissal were that no precedent existed in the State of New York for holding a school system liable for a student's education.[24] Donohue's attorney has promised to appeal "right up to the Supreme Court of the United States if necessary."[25]

Malpractice suits are also plaguing higher education, in that students are claiming contract damages for universities' failure to provide bargained-for-services.[26] Veronika Nicolas, a George Washington University student, sued the university claiming that the course which she took in architecture was "pure junk."[27] She settled out of court for the balance of her tuition.[28] In *Ianniello v. University of Bridgeport*,[29] Irene Ianniello sued the University of Bridgeport for monetary damages claiming that one of her required courses in secondary education was "worthless." The case was dismissed in June of 1977 on the grounds that education was not a consumer service in the ordinary sense of the word.[30] The judge further recommended that other judges stay away from even trying to decide what constitutes "educational quality."

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[20] *Id.* at 861.
[21] *Id.* at 855.
[22] Newell, American Educator at 4.
[23] *Grad Who Can't Read Sues School District*, The Indianapolis Star, Sept. 12, 1977, § 1 at 2.
[24] *Id.*
[25] *Id.*
[26] J. Mancuso, Academic Challenges in the Courts, The Many Faces of Educational Consumerism, (Lexington, Mass: Lexington Banks 1978) at 98.
[27] Baratz & Hartle, *'Malpractice' in the Schools*, 41 Progressive, June 1977, at 34.
[28] Barnes, *supra* note 13.
[29] Chronicle of Higher Education, Nov. 24, 1975.

MALPRACTICE—ACCOUNTABILITY

Two separate approaches are now being taken to define the concept of educational malpractice. The first involves the increasing tendency of some courts to consider the act of college registration as a form of implied contract and the college catalog as a form of advertising.[31] This opens the door for a future suit using the issue of false advertising to prove educational malpractice.

The second approach is through specific adoption of competency testing standards by many states. David Abel, writing in the *Harvard Educational Review*, contends that "If the court accepts the theory that there are certain requirements all schools face in order to educate their students, it is requiring that they educate students to certain minimum standards or face possible court action for damages."[32] In commenting on a recent case filed in behalf of Richard Fisher, a 21-year-old graduate of Seattle's Lucifer High School who is suing to force the school system to pay for an intensive course in remedial reading for him, Joan Baranski, editor-in-chief of *Teacher Magazine*, commented: "The public is demanding that professional people prove that they are doing correctly what they say they are doing.[33] The problem is so intense that the teachers across the country are now starting to demand malpractice insurance as part of their contracts with local school boards.[34]

Benjamin Cox has carefully examined the concept of accountability as it relates to culpability.[35] Cox feels that responsibility reduces itself to three criteria: 1) Everyone, except the very young, is responsible for his own behavior; 2) Responsibility implies justification; and 3) Responsibility implies behavior (a person must be responsible for doing something.) Contrasted with these responsibility criteria are three culpability criteria: 1) A person is culpable when he denies responsibility for his behavior wholly or partially or pretends to share it; 2) A person is culpable when he reneges on his responsibility to something for poor reasons, maintains a responsibility to something that is of more worth; and 3) A person is culpable when he performs those acts for which he is responsible less than he could, when he continues performing acts within his responsibility in the knowledge that they are not warranted, or when he chooses to perform acts for which he is responsible in preference to others that are more fully warranted. The problem with these criteria, Cox feels, is that the only thing that is clear about them is that they are not clearly spelled out anywhere. To specifically apply these criteria to education has proved extremely difficult.

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[30] Newell, American Educator at 5.

[31] Barnes, *supra* note 13 at 10.

[32] Newell, American Educator at 5.

[33] *Suing the Teacher*, 90 Newsweek, Oct. 3, 1977, at 101.

[34] *Id.*

[35] Cox, *Responsibility, Culpability, and the Cult of Accountability in Education*, 58 Phi Delta Kappan, June 1977, at 761-66.

Harry Broudy, author of *The Real World of the Public Schools*, feels that "where schools are concerned, the demand for accountability is valid only under certain conditions.[36] The limitations on accountability for schools may be summarized as follows:[37]

1) The special function of the school is clearly identified and agreed upon.
2) The outcomes for which the school is held accountable are well within its control.
3) There can be agreement on or acceptance by the public of some common body of teachable knowledge, skill, and value that all children within the educable range at the school can be expected to study.
4) The standards for quality are clear, either in the form of standards within recognized domains of knowledge, as determined by experts in those domains.
5) The members of a profession are recognized as experts—whether teachers or administrators—in various aspects of the educative process.
6) There is some consensus on educational theory—at least with respect to terminology, topics for study, and methods of inquiry."

The real danger inherent in such a system is the attempt to reduce everything to an input-output approach. Not having control of all of the variables of input makes the guaranteeing of outputs risky at best.

CONTEMPORARY

The threat of malpractice will undoubtedly force teachers and administrators to become more carefully schooled in the concept of academic fraud. Negligent instruction, poor documentation, and lack of clear classroom presentation are all common faults subject to possible litigation.[38] The doctrine of *respondeat superior* will visit the sins of the faculty upon the administration as well. Undoubtedly, administrators will have to "get the faculty in line" with a more uniform policy which is more easily defensible in court. Academic freedom will inevitably come into conflict with accountability with no clear winner in sight. No winner, that is, unless educators decide to clean their own house before the courts and legislatures do it for them.

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[36] *Id.* at 763.

[37] H. Broudy, The Real World of the Public Schools (New York: Harcourt, Brace, Jovanovitch) at 136.

David Field, professor of physical education at Ball State University, has proposed a unique plan to overcome the charges that teachers are incompetent.[39] Field is calling for a "warranty program" to guarantee the performance of beginning teachers. A student who embarks on this program is guaranteed by the graduating educational institution to be possessed of demonstrated basic competencies. If the school board is dissatisfied with the new teacher's performance, every effort will be made to correct that teacher's performance for a period of two years. If the board terminates the teacher's contract at the end of the period, the College of Education will counsel the principal and superintendent concerning a suitable replacement. The program would be voluntary, but prestigious, and carry minimum risk to the institution. Field feels that the warranty program could very well meet the criteria of the Uniform Commercial Code that the product meet the need for which it is intended. As with any good manufacturer, the teacher products would be acceptable to the public on at least a 95 percent basis.

Dr. Michael Halberstaum does call for caution before the education profession runs in full panic before the malpractice crisis.[40] He warns of the promoters who will try to get educators to change the ways that they teach to please the lawyers and lecturers on the subject of malpractice. He foresees the effects of a panic over this subject as stifling innovation, fostering paperwork, and making adversaries out of parents. The only consolation which he can hold out to teachers is to remind them that they must be considered by their publics to be doing work of such serious importance that they are willing to sue them about it. One can only wonder at the comfort which the pupils will gain from becoming the recipients of the results of these suits.

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[38] Barner, *supra* note 13 at 11.

[39] Field, *A Warranty Program for Teachers—Who Dares Try it?* 56 Educational Horizons, Spring 1978, at 117-120.

[40] Halberstaum, *Hey, You Ought To Sue The Doctor*, 1 American Educator, Summer 1977, at 7-8.

SUMMARY

Halberstaum's call for constraint is sound advice. The time to panic is not yet with us, and the time to reform within the ranks is still given to educational leaders. Like most fads, the competency testing movement will have its place in the sun and then flee before the dawning of another innovation. But the innovations are only symptomatic of the deeper problems which still face educators.

To solve those problems will require a cooperative effort with parents and students. A defining and/or reevaluation of the responsibilities of all parties involved will go a long way toward eliminating the "fixing of blame" which so often characterizes the defensive posture of society's expectations with regard to education. People are not technological products and education may never be fully reducible to the level of a science. The truths of these insights are not to be found at the end of a courtroom trial, but in the developing of trust between human beings—something which the education of the "machine age" has forgotten to consider as a "fact of life."

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Education Policy and Educational Malpractice

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INTRODUCTION

Educational malpractice in 1978 is a field of inquiry new or threatening for legal theorists and educational practitioners. As of 1976 it was said that "There is virtually no law in this area."[1] The law as of 1978 is forming.

Until the last half of the twentieth century the school was an institution whose officers and employees enjoyed, under the common law, the freedom to treat pupils with a wide latitude of discretion. Rarely challenged and even more rarely checked in courts in the exercise of their duties, the school resembled a primary grouping as much as a secondary organization. The school teachers and administrators, much like parents, were assumed to protect the interests of children even when it hurt the children.

In a community where custom saw the teacher as moral exemplar as much as or more than intellectual, the effectiveness of teachers was seldom challenged. Teachers' morals appeared to be of more concern to the community than their intellectual or teaching skills. If teaching effectiveness was seldom of great concern, it might have been so because of a lack of professional stature of teaching. In *Corpus Juris Secundum*, under "Malpractice" there is reference to attorney and client, physicians, surgeons, dentists, oculists, x-ray manipulators, veterinarians, nurses, and other practitioners, with a caution to see "malpractice" by public officers, but no reference to teachers.[2] Under the heading

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1. *Comment: Educational Malpractice*, 124 U. Pa. L. Rev. 756 (1976).
2. 54 C.J.S. *Malpractice*, at 1111 (1948).

"Malpractice" in *American Jurisprudence 2d*, one is directed to see Attorneys at Law and Physicians and Surgeons.[3]

In order to suffer from malpractice suits an occupation must be recognized in common law as having some body of expertise, the lack of which has been deemed to be harmful to a client. So, while teachers were spared from malpractice suits, it was by custom not deemed possible to seek remedy for the misapplication of that which was not recognized fully as being efficacious even at its best. Great teachers were recognized from time to time but most teachers were expected to take the custodial role of *in loco parentis*.[4] A malpractice suit can be seen from one point of view as evidence of a maturing occupation. If teaching is done badly or in not enough quantity its effectiveness is allegedly harmful to a plaintiff, even though he might be passed along to graduation.

Seeking remedy under the law of torts has not appeared to those who allege personal inquiry as the only way open in the courts to seek recovery for the harm. In the "Comment" cited above, contract theories were reviewed under which plaintiff could seek recovery. The conclusion was that tort law is more flexible and "more hospitable to novel lawsuits than the law of contracts" and contract damages may be limited by agreement of both parties.[5] A suit in Louisiana was brought under contract law to recover $1,000 for the failure of a state university law school to prepare the plaintiff properly for the state bar exams, which he failed three times.[6] The Court of Appeals dismissed the case as having no cause of action, on the grounds that the state was immune from suit unless the legislature specifically waived immunity to allow for suits. The court declared such action could only be in tort.[7]

THE CASES

A chain of litigation concerning alleged educational malpractice now exists. It began with the case of *Peter W. v. San Francisco Unified School District*.[8] This precedent setting case was cited in at least two other cases, in Iowa[9] and New York.[10] It was cited in a dismissal order of a malpractice complaint in a Florida court.[11] The Court of Appeals, First Appellate District of California, affirmed the judgment of dismissal of the plaintiff's pleas by the lower court.[12] The Appellate Court reasoned that no case of action was stated based either upon a breach of duty of care,[13] or upon misrepresentation.[14]

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[3] 52 Am. Jur. 2d. *Malpractice*, at 313 (1970).

[4] W. Waller, The Sociology of Teaching (1932).

[5] *Comment: Educational Malpractice*, 124 U. Pa. L. Rev. at 784-789.

[6] Huckabay v. Netterville, 263 So. 2d 113 (La. App. 1972).

[7] *Id.* at 117.

[8] Peter W. v. San Francisco Unified School District, 60 Cal. App. 3d 814 (Ct. App. 1976).

[9] Beaman v. Des Moines Area Community College, Law No. CL 15-8532 (1977).

[10] Donohue v. Copiague Union Free School District, 407 N.Y.S.2d 874 (1978).

Peter W. attempted to state a cause of action based upon "negligent acts and omissions by the defendant school district, its agents and employees, plaintiff graduated from high school with a reading ability of only the fifth grade (sic). As a further proximate result . . . plaintiff has suffered a loss of earning capacity by his limited capacity to read and write and is unqualified for any employment other than . . . labor which requires little or no ability to read or write."[15] He further alleged that the inability to gain meaningful employment was permanent.[16]

The court recited the brief formula in the State of California requisite for a cause of action for negligence:

1. Facts showing a duty of care in the defendants,
2. Negligence constituting a breach of the duty,
3. Injury to the plaintiff as a proximate result.[17]

The court focused upon the issue whether the plaintiff alleged facts sufficient to establish that the defendant district owed him a "duty of care." The court admitted that the defendant did not have statutory immunity from the negligence liability with which it was charged, but emphasized that liability is the rule "only when there is negligence . . . to state a cause of action every fact material to the existence of statutory liability must be pleaded with particularity."[18]

The applicability of the doctrine of *respondeat superior* was admitted: "a public entity may be held vicariously liable for the conduct of its employee . . . only if it is established that that employee would be personally liable for the conduct upon some 'acceptable theory of liability.'"[19] But while a plaintiff may plead a cause of action for negligence, he is required to state one, meeting the pleading requirements.[20] So far that is the big hurdle.

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[11] Garrett v. The School Dist. of Broward Cty., Cir. Ct. of 17th Jud. Cir., Broward County, Fla. Case 77-8703 Seay (1977).

[12] Peter W. v. San Francisco Unified School District, 60 Cal. App. 3d 814, 817 (1976).

[13] *Id.* at 825.

[14] *Id.* at 827.

[15] *Id.* at 818.

[16] *Id.*

[17] *Id.* at 820.

[18] *Id.* at 819.

[19] *Id.*

[20] *Id.*

Three judicially recognized theories argued by the plaintiffs were reviewed: 1) that the "assumption of the function of instruction of students imposes the duty to exercise reasonable care in its discharge", 2) that "a special relationship between students and teachers which supports (the teachers') duty to exercise reasonable care," and 3) that "the duty of teachers to exercise reasonable care . . . is recognized in California." All were dismissed with cases cited as not involving the key question of duty of care in the process of academic education. Physical safety cases were distinguished from the matter of academic "duty of care."[21]

A cause of action recognized as being materially different from the other counts subsumed above under the "duty of care," rubric, was that of misrepresentation. Peter W. alleged that the district's agents and employees "falsely and fraudulently misrepresented to plaintiff's mother . . . that plaintiff was performing at or near grade level in basic academic skills such as reading and writing," and "as a direct and proximate result . . . plaintiff suffered the damages set forth herein."[22] The court held "For the public policy reasons heretofore stated with respect to plaintiff's first count, we hold that this one states no cause of action for negligence in the form of the misrepresentation alleged." The court held that since no facts were presented which showed reliance upon the misrepresentation, that no cause of action was presented.[23]

Questions of teaching methodology, seen by the Peter W. court as lacking in readily acceptable standards of use such as the "activity of the marketplace or highway,"[24] impact any allegation of professional malpractice. The court in saying that there were many views on pedagogy, including laymen's views on it, appeared to dismiss any professional consensus on what would be negligent or nonnegligent. Appropriateness or efficacy of selected classroom methodologies will recur as issues in any future negligence actions, because what is done in the classroom is at the heart of the duty of care.

Misrepresentation, alleged by Peter W., bears directly upon the use and interpretation of mental measurement. This issue and that of methodology, the results of which are subject to measure, must be addressed carefully in negligence actions, in order to state a cause of action and to respond to the duty of care issues. These two as bases for negligent acts will be discussed later in this paper. Both issues were opened up, but quickly closed in the San Francisco case.

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[21] *Id.* at 820-821.
[22] *Id.* at 827.
[23] *Id.*
[24] *Id.* at 824.

The Beaman case in Des Moines was brought by students who were enrolled in a telecommunications program offered in a community college. Plaintiff students pleaded the existence of certain standards and guidelines for the instructor teaching the course and necessary equipment, and alleged that the defendant college failed to comply with these standards and guidelines. Therefore, the plaintiffs pleaded that the defendant college was negligent. The court stated the necessity of the plaintiff's pleading sufficient facts to establish the three elements of negligence; duty of care owed by defendant to plaintiffs, a breach of that duty by defendant, and injury to the plaintiffs as a proximate result of said breach.[25]

The court addressed the "novel legal question" whether students who claimed they failed to receive the requisite education in a course or program have a cause of action against the public institution offering the course or program. The court held they did not, and relied exclusively on the Peter W. case as precedent.[26]

The Iowa court refused explicitly to expand the concept of negligence to include "complaints arising from the area of academic education."[27] The court, using a citation of a California case by the Peter W. court, which established public policy guidelines for application of the "duty of care" principle, refused to recognize a duty of care from the defendant to the plaintiffs.[28] Failing to establish the first element in negligence, the plaintiffs could not state a cause of action. The college's motion to dismiss was sustained.[29]

Edward Donohue sought to recover $5,000,000 in damages for being permitted to graduate after receiving failing grades in several subjects, and lacking reading and writing skills. He found it necessary to obtain tutoring to acquire the basic skills which he did not obtain in high school. The first cause of action, sounding in negligence, alleged that the defendant owed a duty of care to "teach . . . varied subjects to the plaintiff; ascertain his learning capacity and ability; and correctly and properly test him . . . in order to evaluate his ability to comprehend the subject matters of the various courses and have sufficient understanding and comprehension . . . as to be able to achieve sufficient passing grades in said matters, and therefore, qualify for a Certificate of Graduation."[30]

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[25] Beaman v. Des Moines Area Community College, Law No. CL 15-8532 (1977) at 0472-1963.

[26] *Id.* at 0472-1964.

[27] *Id.* at 0472-1964, 0472-1965.

[28] *Id.* at 0472-1965. (*Citation made* in Peter W. opinion) Raymond v. Paradise Unified School Dist., 218 Cal. App. 2d 801, 809 (1962).

[29] *Id.* at 0472-1966.

[30] Donohue v. Copiague Union Free School District, 407 N.Y.S.2d 874, 876 (1978).

Donohue detailed the breach of the duty of care in that the defendant district, its agents and employees:

1. Failed to evaluate his mental ability and capacity to comprehend the subjects taught to him,
2. Failed to interview, discuss, or psychologically test him in order to ascertain his ability to comprehend the subject matter,
3. Failed to provide adequate school facilities, teachers and other personnel trained to take the necessary steps in order to ascertain his learning capacity and intelligence,
4. Failed to teach the plaintiff so that he could cope with the various subjects which they taught him,
5. Failed to supervise him properly,
6. Failed to advise his parents of the difficulty and the necessity to call in psychiatric help,
7. Used defective processes not commensurate with a student attending a high school in Suffolk County,
8. Failed to adopt accepted professional standards and methods to evaluate and cope with the plaintiff's problems which constituted educational malpractice.[31]

The Supreme Court at Special Term granted the school district's motion to dismiss the complaint. The plaintiff appealed from the order to the Appellate Division of the Supreme Court.

The Appellate Court, relying heavily upon the Peter W. court, found no duty of care running from educators to students. The Beaman case in Iowa, and the Garrett case in Florida, were mentioned as having adopted the reasoning of the California court. Justice Damiani's opinion recognized that educators are legally and ethically responsible for providing a meaningful public education for the youth of the state, but this did not convince the court that they may be sued for damages by an individual student for failure to reach certain objectives.

The courts have often stated their reluctance to substitute their judgments for school boards and for educators.[32] The Donohue court in a lengthy dictum saw the perils of opening up to juries the need to choose one teaching method over another, or how to balance the educational needs of one student against the needs of all the students, given scarce educational resources.[33] It warned of the perils, cited in another New York case, of the courts interfering with professional judgments in administering examinations and using local resources.[34]

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[31] *Id.* at 876.

[32] Wood v. Strickland, 420 U.S. 308, 326 (1975), contains an example of a boundary-setting statement: "It is not the role of the federal courts to set aside decisions of school administrators which the court may view as lacking a basis in wisdom or compassion. Public high school students do have substantive and procedural rights while at school (citations)."

[33] Donohue v. Copiague Union Free School District, 407 N.Y.S.2d 874, 879.

The second cause of action (similar to the first in Peter W.), rested upon the New York State Constitution, which provides for a system of free common schools in which all children of the state may be educated. The defendant district operated a school under the state constitution and failed "to educate the plaintiff, thus breaching constitutional duty."[35] The court disagreed with this line of reasoning, stating instead that the purpose of the common schools is to "confer the benefits of a free education upon what would otherwise be an uneducated public." Failure of educational achievement cannot be construed as "injury" in tort law. "Statutes which are not intended to protect against injury, but rather are designed to confer a benefit upon the general public, do not give rise to a cause of action by an individual to recover damages for their breach."[36]

Donohue charged that the defendant violated a section of the state education law which required that each student who failed or was an "under-achiever" be evaluated to ascertain the causes and to determine if a special education program were needed. The court's interpretation of the statute was that it was not intended to protect a student from injurious teaching, but was designed to direct more educational resources toward "under-achievers." The recourse for an underachiever could be to demand the special testing and evaluation, with an appeal to the State Commissioner of Education as a remedy to a district's failure to take the appropriate action. The court did not find that the plaintiff had showed that the failures of the school district were the proximate cause of his failure to learn. "The failure to learn does not bespeak a failure to teach."[37]

The plaintiff's illiteracy, according to the court, may have resulted from other causes, a host of other non-school factors might, along with innate intelligence, affect learning. And finally, the problem of assessing the plaintiff's contributory negligence was raised as being "virtually impossible to calculate." Public policy was held as recognizing no cause of action for educational malpractice.[38]

In a strong dissent, Justice Suozzi saw a cause of action in the complaint. He disagreed that the public policy considerations enunciated by the court mandated a dismissal of the complaint. The question of whether the negligence is that of the school system, or forces outside the teaching process, is really a question of proof to be resolved at a trial. He rejected the fear of a flood of litigation and the difficulty of assessing appropriate damages as unpersuasive elements of the public policy. Following the abolition of sovereign immunity subsequent litigation did not turn out to be excessive. Further, he found no reason to differentiate between educational malpractice and other forms of negligence and malpractice litigation "which currently congest our courts."[39]

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[34] *Id.* at 879-880; *See* James v. Board of Educ., 42 N.Y.S.2d 357.

[35] *Id.* at 877.

[36] *Id.* at 880; *See* Steitz v. City of Beacon, 295 N.Y. 51 (1945); Moch Co. v. Rensselaer Water Co., 247 N.Y. 160 (1928).

[37] *Id.* at 881.

[38] *Id.*

His strongest dissent concerns the interpretation and application of former section 4404 of the Education Law of New York, which was in effect while the plaintiff was in high school. Donohue's continuous failure marked him as one of a class who were clearly referred to in the statute as children who fail or underachieve.[40] In the dissenter's opinion, the plaintiff showed the court the statute which established a mandatory duty flowing from the defendant to him. Further, the plaintiff showed he fell clearly within the class of "children defined by the statute as those who fail or under-achieved." Justice Suozzi stated, "to dismiss the complaint, as the majority proposes, without allowing the plaintiff his day in court, would merely serve to sanction misfeasance in the educational system."[41] He drew the analogy between the plaintiff, being pushed through school, without any attempt being made to help him, and a medical practitioner who fails to diagnose the specific condition and treat the condition.[42]

The Suozzi dissent is a warning to those who might take comfort in the court's dismissing the cases reviewed for lack of cause of action. If a statute exists which defines the duty of care, a cause of action may exist and the negligence action will result in a trial.

Suozzi's concern for the future was the lack of properly directed professional effort, rather than for a flood of negligence suits, each aiming to recover money, resulting in the impoverishing of districts. His dissent depended heavily upon the imposition of a statutory duty of cause in New York, represented by Section 4404 of the Education Law which then was in force. He identified that part of the code which was directive to the school district, or to the Commissioner of Education. The statute called for the district to do something about people like Edward Donohue. The law directed the board of education of the district to:

1. Cause examinations to be held in order to ascertain

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[39] *Id.* at 882-883.
[40] *Id.* at 884.
[41] *Id.*
[42] *Id.*

> physical, mental, and social causes of under-achievement of every pupil in a public school not already attending a special class who has failed continuously in his studies or who is listed as an "underachiever."
>
> 2. Have such examinations made according to the directions of the state commissioner of education to determine whether such children are capable of benefiting through ordinary classroom treatment, or if they would profit from special education facilities.[43]

The court did not agree that the statute allowed for recovery for injury to those who were not benefited. A duty of care did not follow this statutory admonition, according to the majority. The dissenter did not elaborate how the duty of care fell upon the defendants.

The majority (and the dissent did not disagree with the interpretation) rested upon legal precedent established by Cardozo in *Moch v. Rensselaer.*[44] Referring to a water service under contract to the city which failed to provide enough pressure to defend plaintiff's property against a fire, the future supreme court justice said "What we are dealing with at this time is a mere negligent omission, unaccompanied by malice .... The failure in such circumstances to furnish an adequate supply of water is at most the denial of a benefit ... not the commission of a wrong.[45] The omission of what the legislature directed was not seen as a wrong by the majority, but the dissenting justice saw it as giving rise to action for negligence.

A difficulty arises in interpreting the proper application of such a statute. If a school "causes to be examined" students who are underachievers in any way, even informally, it may be in accord with the law. If it examines such students to determine whether they could benefit from special classes, but does not do so, even for one whose failure record is egregious, is there a breach of statutory duty? The majority thought not, leaning upon Cardozo's language of "mere negligent omission or denial of a benefit."

Apart from the problem of the legal definition of negligence, the effects of statutory or administrative law on professional practice remain. Unless the law specifies which kind of examination, to be applied under what circumstances, and details the subsequent diagnosis and referral to specific kinds of treatment, the professionals are left with latitude of discretion. The section in question appeared to call for some kind of action, therefore duty, from the defendant, but the satisfaction of that duty of care was quite simple. The majority did not inquire into whether the statute had been followed, or how, but assumed that the professionals had followed it, exhorting that the courts must not try to run the schools. Justice Suozzi did not state what course of remedial action should have been taken to teach Edward. The majority suggested he might have appealed for something to the State Commissioner of Education.

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[43] *Id.*

[44] Moch v. Rensselaer Water Co., 247 N.Y. 160, 159 N.E. 896 (1928).

[45] *Id.* 159 N.E. 896, 899.

Absent a showing of malice or civil rights violations, the professional educators still possess great latitude to apply their skills, regardless of the consequences for students.

ESTABLISHING A CAUSE OF ACTION IN EDUCATIONAL MALPRACTICE

A cause of action founded upon negligence requires the satisfaction of a traditional formula with these elements:

1. A duty or obligation, recognized by the law, requiring the actor to conform to a certain Standard of Conduct, for the protection of others against reasonable risk.
2. A failure on the part of the actor to conform to the standard required. Both the first and second elements of the formula must go together, because an actor's conduct may fall below an accepted standard but is not liable if he has no recognized duty to the plaintiff.
3. A reasonably close causal connection between the conduct of the actor, or defendant, and the resulting injury to the plaintiff, commonly known as "legal cause" or "proximate cause."
4. Actual loss or damage resulting to the interests of the plaintiff. Threat of future harm is not enough.[46]

A more stringent set of conditions for establishing the actor's liability follows:

a. The interest invaded is protected against unintentional invasion,
b. The conduct of the actor is negligent to the other or a class of persons within which he is included,
c. The other (plaintiff) has not so conducted himself as to disable himself from bringing an action for such invasion.[47]

The rules for dealing with burden of proof, whether the court or jury finds the facts, are as follows:

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[46] W. Prosser, Handbook Of The Law Of Torts § 30 at 143-144 (4th ed. 1971).
[47] Restatement (Second) Of Torts § 281 (1965).

The plaintiff has the burden of proving:

a. Facts which give rise to a legal duty on the part of the defendant to conform to the standard of conduct established by the law for the plaintiff,
b. Failure of the defendant to conform to the standard of conduct,
c. That such failure is a legal cause of the harm suffered by the plaintiff, and
d. That the plaintiff has in fact suffered harm of a kind legally compensable by damages.[48]

The burden of proof referred to above indicates both the burden of introducing evidence sufficient "to justify a jury in finding for the party having the burden, and the burden of persuading the jury to find for that party upon the matter in issue."[49]

STANDARD OF CONDUCT

A legal standard of conduct can be either that of the reasonable man, which is, in professional malpractice suits, that of the average professional, or a statutory standard of conduct. In the first of these, the plaintiff must prove facts which establish legal duty on the part of the defendant to conform to a legal standard of conduct.[50]

The standard of conduct of a reasonable man may be:

a. Established by legislative enactment or administrative regulation,
b. Adopted by the court from legislation or administrative regulation which does not so provide,
c. Established by judicial decision, or
d. Applied by the facts of the case by the trial judge or jury, if there is no legislation, regulation or decision.[51]

The standard of conduct may be one appropriate for other professionals like those who treated a plaintiff student which is described: "Unless he represents that he has greater or less skill or knowledge, one who undertakes to render services in the practice of a profession or trade is required to exercise the skill and knowledge normally possessed by members of that profession or trade in good standing in similar communities."[52]

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[48] *Id.* § 328A.
[49] *Id.* § 328A, *comment* a at 149.
[50] *Id.* § 328A, *comment* c at 150.
[51] *Id.* § 285.
[52] *Id.* § 299A.

The skill referred to above is not the skill he actually has, but the skill he represents himself as having or is understood to undertake to have.[53] The skill is not the highest expected of the class of professionals in question, nor is it the lowest possible level, but that of an average member.[54] The licensing statutes provide a minimum standard or requirements of skill for those in profession. The statutes thus protect the students by establishing a level of competence beneath which a certificate person is not expected to fall. But the fact of holding a certificate may not signify the holder as being of average skill as a teacher.[55]

The standard of care for the community is that of persons engaged in similar practice in similar localities, considering geographical location, size and the character of the community in general.[56] The application of this element of the standard eliminates the possibility of a Serrano-type suit in negligence. The purpose of bringing action in negligence is not to obtain more resources for the school or district, or to establish the application of a principle of equality for members of a class. A plaintiff in a poor ghetto school cannot establish a cause of action by comparing teaching in that school with teaching in a wealthier suburban district, or with an idealized type of teacher found only in a very few schools. The burden of proof on the plaintiff is to "prove that he has suffered harm of a kind legally compensable for damages."[57]

The Peter W. appeal was dismissed for want of a cause of action because the plaintiff did not show a duty of care related to a clear standard of duty of care.[58] Interestingly, the court grouped the alleged statutory duty of care, which it also rejected, with the first count.[59] That standard is distinct and will be discussed next.

THE STATUTORY STANDARD OF CONDUCT

Public policy in recent decades has played a predominant part in negligence cases. The law of torts, perhaps, more than any other branch of the law, is a battleground of social theory.[60] Social theories are theories which eventually are written into public policy. Public policy is fashioned gradually into case law, more abruptly into legislation and regulation. The public policy of education has clearly been shaped by case law and statutory law with dramatic effect since 1954. Cases in negligence can shape public policy as powerfully as cases in equity have in the past, depending upon the interpretation courts give to the standard of conduct as defined by statutes and regulation. Tort law may well call forth new statutory and administrative law which will clarify or extend the standard of conduct expected for professionals.

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[53] *Id.* § 299A, *comment* c at 74.
[54] *Id.* § 299A, *comment* c at 75.
[55] *Id.* § 299A, *comment* f at 75.
[56] *Id.* § 299A, *comment* g at 75.
[57] *Id.* § 328A, *comment* f at 151.
[58] Peter W. v. San Francisco Unified School District, 60 Cal. App. 3d, 814, 824-825.
[59] *Id.* at 826.
[60] W. Prosser, Handbook Of The Law Of Torts § 3 at 14-15 (4th ed. 1971).

A court may adopt a standard of conduct defined by legislation or regulation, the purpose of which is found to be exclusively or in part:

a. To protect a class of persons which includes the one whose interest is invaded, and
b. To protect the particular interest invaded, and
c. To protect that interest against the kind of harm which has resulted, and
d. To protect that interest against the particular hazard from which the harm results.[61]

The conditions for statutory liability are exacting but flexible. The Donohue court addressed squarely the question of liability established by statute. The principle the majority rested its decision upon was that civil liability under a statute must be specifically stated or necessarily implied, otherwise the court is under no compulsion to accept it as defining any standard of conduct for a tort action.[62] Two interpretations of legislative standards are possible. If the legislation has not made explicit provision for civil suit, the court is not compelled to accept it as a standard of conduct in tort action. However, the court may see an implication for liability in the legislation.[63] Very little legislation or administrative regulation carries explicit civil liability.

Most legislation and regulation concerning education is directive. Boards or districts, or their officers or administrators, are directed to execute federal, state or local policy. The purpose of such legislation is not to provide an opening for damages in civil liability action but to confer a positive good on citizens. If the enactment:

a. Protects the interests of the state or any subdivision of it, or
b. Secures to individuals the enjoyment of rights and privileges to which they are entitled as members of the public, or
c. Imposes upon the actor the performance of a service which the state or its subdivisions undertake to give to the public,

the legislation or regulation will not be adopted as the standard of conduct.[64]

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[61] Restatement (Second) Of Torts § 286 (1965).
[62] *See* text accompanying notes 45 and 46, *supra*.
[63] Restatement (Second) Of Torts § 286, *comments* c and d at 25-26.
[64] *Id.* § 288.

Violations of the statutes, if they are excused by law, are not negligence, and even when not excused by law are not negligence if the actor "is unable to comply after reasonable diligence, does not know of the occasion for compliance, is confronted by emergency not due to his own misconduct, and when compliance would involve a greater risk of harm to the actor or to others."[65] If a statute admits of no excuse it imposes strict liability,[66] examples of which abound in laws protecting safety of passengers or workers, or in the prescription and purveying of drugs. The unexcused violation of a statute or regulation which is adopted by a court as defining the standard of conduct is negligence in itself.[67] Compliance with a statute or regulation does not prevent a finding of negligence where a reasonable man would take additional precautions.[68]

The amount of legislation and regulation enacted since 1965 has perhaps equalled or exceeded all those enacted since colonial times. The drift in law has been away from general exhortations, boundary setting, or enabling of local units, toward prescriptive behavior. Much of the prescriptive tendency has been to correct abuses, as tightened regulations of the Johnson-O'Malley Act were designed to eliminate violations of the intent of Congress. An example of a federal law which at the beginning was prescriptive, bespeaking a lack of confidence in educators to use a standard of conduct acceptable to food professional practice, is P.L. 94-142.[69]

As laws become more prescriptive, the possibilities for using them as a statutory standard of care increase along with their applicability in negligence under tort law. The more prescriptive the law becomes, the more it approaches the likelihood of being construed by a court as a statutory duty of care. The more detailed the standard of care, the clearer the case for violation becomes, and the more important the inquiry into conditions surrounding violation becomes. The Peter W. attorneys failed to establish a cause of action by alleging the defendant district's violation of a California code requiring that parents be informed as to the students' progress and achievement, and a violation of the constitution and laws requiring the teaching of reading and writing to students.[70] The cited regulations and laws could not be used to establish a statutory standard of conduct because they did not explicitly allow for civil liability in their breach, nor could they be construed as anything other than the conferring of benefits upon a class of people, who were students.

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[65] *Id.* § 288A.

[66] *Id.* § 288B.

[67] *Id.* § 288C.

[68] Johnson-O'Malley Act, ch. 147, 48 Stat. 596 (1934), *amended* ch. 490, 49 Stat. 1458, 1459 (1936), *current version* at 25 U.S.C. § § 452 to 454 (1975).

[69] Act of Nov. 29, 1975, Pub. L. No. 94-142, (20 U.S.C. § 1401).

[70] Peter W. v. San Francisco Unified School District, 60 Cal. App. 3d 814, note 5 at 816.

The New York State Board of Regents established competency tests with certain scores required as a condition precedent to the receipt of a diploma, effective June 1, 1979. High schools will have to submit students' transcripts to the Department of Education prior to a student's graduation so that the school may be informed of any deficiency. The Regents' testing program includes examination and identification of students who need special help as early as grade three, and again in grade six. Preliminary competency tests will be administered to all students in grade 8 or 9. Remedial instruction guidelines were being prepared by the department for distribution in the 1978-79 academic year.[71] Whether these regulations took form as a result of the Donohue case is less important than the possibility of their being less ambiguous than what preceded them. They impose upon the local district and the department something more closely approaching a statutory duty of care than formerly.

Every statute, no matter how tightly drawn, is capable of interpretation in a court. That is a feature of our common law system with its separation of powers. Each law, no matter how specific, gives rise to a variety of interpretations. The laws and regulations are studied by professionals who then plan their compliance strategies. Balancing the needs of various groups in the district against the resources available is an administrative task, under the guidance of local board, state and federal policy. Interpretation is a right granted to the school district officers and administrators, and courts are respectful of the resulting application of the laws, fearing the creation of chaos if they interfere.[72]

A federal court of appeals recently considered the doctrines of *per se* negligence and implied civil liability from the Pennsylvania education code, as opposed to an interpretation of the school code which would be applied solely as a definition of the responsibility of school boards and their employees. The action was brought as a civil rights case by a student with learning disabilities on behalf of himself and all other such children in the Philadelphia school system. The court of appeals agreed with the trial court that abstention by the federal court would allow the plaintiff to argue an unclear issue of state law; that is, whether 24 Purd. Stat. § 13-1371 creates a private right of action for damages in the state court. A positive finding in a state court for the plaintiff would obviate the necessity of a decision on a federal constitutional question of relief under the First, Ninth and Fourteenth Amendments. The abstention was preferred to a remedy of granting an injunction to allow trial for damages to a child with a learning disability who had sought remedy for the results of inappropriate instruction.[73]

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[71] 8 N.Y.C.R.R. 103.2 *as amended* (1978).

[72] *See* Shea, *An Educational Perspective of the Legality of Intelligence and Ability Grouping*, 6 J. Law & Education 137 (1977) for a discussion of some courts' misunderstanding of intelligence testing, the reluctance of other courts to determine precisely what's measured by the tests, and what steps are to be taken based on the tests.

IMPLICATIONS OF THE EDUCATIONAL MALPRACTICE CASES FOR PUBLIC EDUCATION POLICY

Any tort action for educational malpractice depends upon the interpretation by the court of the laws and regulations made by states and the federal system. The laws, regulations and court cases constitute the public policy of education. The perceptions the courts have of public policy lead them to deny relief under tort law so far.

If the court were to allow the juries to find facts, interpreting the massive framework of public education policy would be incumbent upon judges. It is not an easy task. Unlike most civil law countries, our public education policy is not national or centralized, hence we cannot refer any more to American education policy than one can to an "Indian policy." There are policies for Indian nations and peoples, but the policies are particular to the nation or tribe. Education policy is mainly state policy, hence particular to each state. Federal educational policy is an overlay on each state education policy; it fits differently to each state. Regulations for federal programs are interpreted differently from one state to another. Formulas for distribution of federal money vary from state to state.[74]

Federal supremacy doctrine allows for an overlay on state law, but federal courts must look at each state's constitution and statutes and the interpretations thereof by those states' courts. For example, the federal courts do not apply the same formula for state relationships with private schools across the nation. One state may have a rule against bussing children to non-public schools, while another state sees every child as having a right to a bus ride, no matter to what school. The federal courts must not do violence to the state's constitutional posture, provided it does not collide with the supreme law of the land.

The variety and interaction between policies are found at the lowest level. Some states have a detailed education policy, other states delegate most policy making to the district. Policy, furthermore, has matured in some states to clear statewide goals and some program alternatives for reaching goals. In other states the goals, programs and activities are the prerogative of the district or school. In all states, professionals differ about the efficacy of program alternatives as well as the goals of schooling. Some aspects of education policy will be reviewed as they relate to educational malpractice cases.

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[73] Frederick v. Thomas, 77-1694 (3d Cir. 1978), *on appeal from* E.D. Pa. (1978).

[74] *See* Pub. L. 874, 81st Congress (20 U.S.C. § 236).

RELATIONSHIP OF EFFECT OF SCHOOLING TO GOALS OF SCHOOLING

The first consideration of policy is the effect of schooling. This touches on the matter of proving harm to the plaintiff. It is a policy matter allied with the goals of schooling. Is learning a lifelong process, with remediation possible at, for example, age 25? Or is learning an incremental set of skills, based on powerful very early learning experiences? Some research emphasizes very early pre-school learning as most powerful.[75] Are the effects of schooling fixed and immutable by a certain age, or can an adult make up the early loss of negligent teaching in school? A pessimistic view, and one not based on the influence of changing analytic models of learning, would infer that damage done to a person in the schools is irremediable. However, the development of research on aptitude for learning, as one example in educational research, combines analyses of aptitude with learning processes in the laboratory or classroom. Such research answers questions concerning how people of varying abilities (and of any age level) learn under varying conditions of instruction.[76] The implications of such research for the proof of injury, and the remedy to the plaintiff are great. If the injury can be remedied by instruction appropriate to the plaintiff's aptitude, at a given age, then injunctive relief appropriate to the plaintiff's need and aptitude can be fashioned, which, as well as remedying the injury, would not bankrupt a district. It would require the district to do that which it ought to do best, which is to fit instruction appropriate to the learner. If a court were to grant an injunction for one who has already been processed through graduation, it would be an order to a district to get into the adult education business, if it is not already there.

The goals of schooling are implied in any discussion of education policy at any level. Goals are fashioned by all educational units, from school to nation. There is even a perceptible set of supra-national goals promulgated by multi-national associations, public and private, and groupings such as UNESCO. The American federal system, with its common law tradition, requires structural as well as substantive attention to the problem of identification of goals amidst the sea of possibilities. In the civil law nations, particularly those with centralized sytems of education, goals are a function of a nationwide political process. Given our multiplicity of goals, our educational system is really a plurality of systems, public and private. Our educational system grew without attention to sequencing and interface. The high school grew rapidly after the Kalamazoo decision,[77] independently of the elementary system then maturing into a graded system. The high school and university began to grow at the same time, but not in coordination. High school students were prepared in a classics curriculum until the first decade of the twentieth century, after which the high school became a comprehensive institution, less concerned about preparing graduates for the university.[78] The junior college and junior high school, born in the twentieth century, flourished in the interstices between institutions, and were never well coordinated with their feeder institutions or with those to which they sent students.

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[75] N. Wallen & R. Travers, *Analysis and Investigation of Teaching Methods*, Handbook Of Research On Teaching 448-488 (1963).

[76] R. Snow, *Research on Aptitude for Learning: A Progress Report*, 4 Review of Research in Education 50 (1976).

Out of this free-wheeling educational growth, a branching system, unmatched in any other country, emerged. A student, failing in one system, could enter another without prejudice. Entrance examinations were held only for the most prestigious institutions and were often waived, if for no other reason than to obtain a more interesting mix of students. If one college did not accept a student whose academic record was a failure, there were other colleges eager or willing to welcome the outcast. By-passes for the late-maturing student were possible. Failing high school meant for millions that their diplomas would come after passing the GED test. Low performance in high school meant admission to a junior college, and then an opening to a university. With the many branches and by-passes, the student who pleads injury as a result of negligent elementary or high schooling may find her plea mooted by a move into what had appeared earlier to be an unattainable institution.

A related aspect of the consideration of injury due to negligent schooling is the question: At what point in the lifetime of the plaintiff are the opportunities, which would have been present with non-negligent teaching, reduced significantly? This is a matter for the court to decide for each case, on its merits, providing proof of injury and the proximate cause of breach of duty to injury have been shown.

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[77] *See* Stuart v. Kalamazoo School District No. 1, 30 Mich 69 (1875).

[78] H. Good, A History Of American Education (1956).

Employment opportunities are a function of many variables: family, socioeconomic, even rate of change peculiar to a society which is called "developed." Opportunities not available resulting from negligent teaching may not be as serious as those resulting from not offering counseling and occupational information.

Schooling in grades K-12 has largely been a self-contained phenomenon. People have left school to seek what was available; schools guaranteed nothing at the end, even promised little. The state has many reasons for schooling; keeping adolescents out of trouble, off the labor market, out of the home to allow parents to work or enjoy themselves. "Preparing people to be citizens" is a dictum etched on the stones above the school doorway, while "preparing people to work" is rarely seen.

If the negligence of a school district is found to be a cause of a plaintiff's employment in a lower than expected occupation, counseling of each student may become necessary to avoid the possibility of proof of misinformation concerning post-school placement opportunities. But the school, if it is to perform an occupational placement-advisement function, will have to change its purposes radically. Successful negligence action may change the nature of the institution, but it is more likely that a court would have to be convinced first that public policy requires schools to perform a function which they have not been expected to perform previously. Placement of pupils in a specific job or preparing them for specific jobs, apart from being difficult, is something public policy has resisted strenuously because to do so would appear to cast the school into a role of locking a student into a lower position than necessary, discouraging the student from mobility into better jobs.

The count of misrepresentation in the Peter W. case was, from a professional point of view, the most damaging of the allegations presented. The court presented a thinly veiled warning to the effect that governmental immunity in California did not protect the defendant from a cause of action for intentional misrepresentation.[79] The court used the same public policy reason it employed to reject the first count, which was that the statute was not a type of enactment designed to protect against the risk of a particular kind of injury.[80] The court interpreted the statute to the effect that it was not designed to protect against a particular kind of injury, so that if a district's employees tried in good faith to present information which was incomplete, or misunderstood by the plaintiff, the law did not allow for a cause of action for negligence. "Intentional misrepresentation" would have to be proved. The plaintiff did not, in any case, show proof of the reliance of the plaintiffs upon the information, and that was fatal to an attempted cause of action.[81]

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[79] Peter W. v. San Francisco Unified School District, 60 Cal. App. 3d 814, 827.
[80] *Id.* at 826.

Misrepresentation as a charge in negligence cases can be based upon a federal statutory duty since 1974. It is difficult to imagine the content of a demurrer which would be sustained against a proven count of withholding or misrepresenting information since enactment of the Buckley Amendment.[82] If the withholding or misrepresentation charge has been proven, the consequences of the withholding of information on the plaintiff's subsequent behavior might not have to be proven by the plaintiff. A state legislative enactment may excuse the school authorities, however, from having to inform the parents on specific matters, such as pregnancies and venereal diseases, if the minors so prefer.[83] Without specific statutory protection, a professional may not take upon herself the power to protect parents or their children from the information which is their right to have.[84]

Professional speaking, a district should be aware of, and attempt to use, the latest scientific information. A district cannot, of course, be held retroactively to a level of science existing several years after the period of alleged negligent teaching. In the decade of the 1970's it would not be unreasonable to expect a district to apply the principles of learning which include feedback to the pupils. This principle has been known for many years and has become a key principle in mastery learning. The concept of mastery learning appears to be based on solid scientific principles enunciated by John Carroll in the 1960's.[85] The mastery learning approach requires that, instead of assigning each student a grade or score on some kind of curve, a learning task be identified for each student, the task be broken into small units, that the pupil is provided feedback on the errors and difficulties after each test, and that the measure of the student's effort is the time spent on completing the task.[86] The principle of feedback is not new; it has been one of the few widely accepted principles of learning. It has been embedded in reinforcement theory since the 1920's which itself has been promoted as a desirable teacher behavior, under the concept "knowledge of progress."[87]

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[81] *Id.* at 827.

[82] Family Educational Rights and Privacy Act of 1974 (current version at 20 U.S.C. § 1232 g).

[83] Md. Ann. Code, Educ. art. 43, § 149 D (1967).

[84] McDermott, *Law, Liability, and the School Psychologist: Malpractice and Liability*, 10 J. Sch. Psych. 397 (1972).

[85] Carroll, *A Model of School Learning*, 64 Tchrs. C. Rec. 723 (1963). *See also* B. Bloom, J. Hastings, & G. Madaus, Handbook On Formative and Summative Evaluation of Student Learning 43-57 (1971).

[86] J. Block & R. Burns, *Mastery Learning*, 4 Review of Research in Education 3 (1976).

ASSIGNMENT OF RESPONSIBILITY FOR NEGLIGENCE

A second major consideration of public education policy is the assignment of responsibility in negligence. Among the related questions are those of school vs. nonschool effects on pupil achievement, the unit of comparison for the plaintiffs, the balancing of objectives of instruction, and the matter of individual professionals or aggregates of them as the respondents in negligence action.

School vs. Nonschool Effects On Pupil Achievement

In order to establish a cause of action, complex research bearing upon the relationship of the actor's negligent teaching to the injury done to the plaintiff will have to be confronted. The most powerful method of determining whether and how much an individual pupil was injured by negligent teaching would be to diagnose the individual and analyze the assignments of the pupil to specific tasks. Individual diagnosis and assignment to instructional treatment is used in many Title I, ESEA, programs. The Title I approach also requires "pulling out" the pupil from the regular classroom for a number of periods each week for special help. Diagnosing and treating each pupil individually is a highly desirable teaching approach, but cannot be used extensively because of the cost involved with a low pupil-teacher ratio. Applying a post-treatment diagnosis to an individual who had been taught as part of a group would determine the extent of injury, but for such a diagnosis to be a reliable analysis, other individuals in the same group would have to be assessed in the same way, to determine how treatment of the plaintiff in a group compared with the success of others in the same group.

A negligence case brought by a student who had not been individually diagnosed and treated would require group analysis. The research in the United States and other countries so far has established the fact that student background (among the variables are mother's education and father's occupation) accounts for a considerably greater share of variance in school achievement than instruction in school. The influence of instruction on school achievement also varies by socioeconomic class, section of the country, and residence in rural or urban areas. Methodological problems abound in these studies but the greater weight of nonschool influence on how children achieve is clear.[88] If the action in negligence seeks to recover for injury done to a plaintiff, or the class of which the plaintiff is a member, how much weight should be given what is done by the school to instruct children? That is really the heart of any complaint.

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[87] T. Weiss, K. Hoover, M. Belok, & D. Mills, Psychological Foundations of Education, at 425-460 (1963).

Do the parents contribute to the negligence of a school if they do not provide for a proper reading regimen in the home? Are malpractice suits appropriate only for lower socioeconomic children where the influence of school instruction on achievement is greater?

The Unit of Comparison

Instruction in nearly all schools is imparted to groups. The unit of comparison for cases in negligence would have to be other groups or classes like those to which the plaintiff belongs. Proof of cause of harm and proof of negligence must be established with at least as much vigor as that which caused an Ohio court to sustain a dismissal of a tenured mathematics teacher from a high school staff for ineffectiveness. The charges were that the pupils assigned to the teacher had been well above average in PLR (probable learning rate) before the plaintiff came to the school, but that after she came their average PLR in mathematics dropped.[89] The science of measurement in 1950 was not what it is in the last quarter of the century.

Proof of negligence speaks to methodology, practice, skill, application of appropriate methods and materials at the right time, based on an estimate or diagnosis of the pupils' prior learning and ability. Proof of negligence rests upon a showing that the pupil, or the class of which she is a member, has not shown as much growth as expected, given the pupils' abilities and effort. This requires the showing of pre-and post-test data, before and after the instruction. An independent assessment of the instruction itself (or process evaluation) is an appropriate method to use in the circumstances. A comparison of methods and activities which were actually used with others which have been proven to be effective with students of similar ability, achievement, and background would be called for. The purpose of such analysis is to demonstrate that the teaching was negligent in that it was inappropriate for pupils with that prior achievement and ability. The comparison of post test data with pre test data would be needed to confirm the charge of negligent instruction, and would be essential for showing proof of injury. But for the negligence of the teacher(s) the pupils would not have been injured.

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[88] K. Harnqvist, *The International Study of Educational Achievement*, 3 Review of Research in Education 85, 99 (1975). For the power of schooling in developed and developing countries, *see* A. Inkeles & D. Smith, Becoming Modern: Individual Change in Six Developing Countries (1974).

[89] Applebaum v. Wulff, 95 N.E. 19, 24 (1950).

A proof of injury requires a showing of the achievement data, pre and post, along with an ability measure. The showing of harm required is that the pupil or class had ability to increase their achievement with instruction, but were not only not improved by the instruction, but were damaged for effective performance at the next step. Simply comparing pre and post test scores would not suffice, however, because the influence of the pupils' background on their achievement is most powerful. In order to prove that the injury was a result of the instruction, as many other variables as possible would have to be controlled except for (but for) the instruction. Multiple correlation analysis is one method used to determine the effects of many school and nonschool variables on achievement of groups.

Another method for assessing injury is to compare groups like those of the plaintiff class. But comparison of groups is very difficult because all other variables than instruction would theoretically have to be controlled. It is practically impossible to find another twenty-five individuals exactly like a plaintiff class. So the comparative method is likely to result in arguments about the appropriateness of the comparison groups.[90] Many other multiple correlation techniques which can control or account for instruction can be employed. But for every statistical method employed, there is an argument for appropriateness; the aftermath of the famed Coleman report of 1966 is but one example.[91] It spawned at least as many arguments about its methodology as about its findings.[92]

Another methodological problem is relevant. In identifying a class as injured, what is the statistical cut off point at which injury is present, and above which it is not. If it is proven that the plaintiff's score, or the plaintiff class mean, on the post test finished a year's instruction at the fifteenth percentile nationally, on a standardized test, after beginning the year on the eighteenth percentile, was the loss significant, with respect to some entrance criterion for occupation or next educational step? Was the threshold of injury the twentieth or eighteenth percentile? What would a non-injurious post test score or mean, or a year's growth be, given the pre test data? Is a loss of percentile position between pre and post test score or mean injurious? The threshold problem of injury was addressed by Justice Powell in the Rodriguez opinion.[93] Applying the reasoning of his opinion to negligence, the question is whether all those of an injured class are injured at least as much as the plaintiff, or alternatively, whether children in classes which fall below some specified average on a learning measure are injured by virtue of that fact.

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[90] *See Comment: Educational Malpractice*, 124 U. Pa. L. Rev. 756 (1956).

[91] J. Coleman, Equality of Educational Opportunity (1966). *See also* H. Averch, How Effective Is Schooling? A Critical Review and Synthesis of Research Findings (1972).

BALANCING THE OBJECTIVES OF INSTRUCTION

Balancing the objectives of instruction is a matter which has largely been left to the school professionals. Goals are set by policy statements of local or state boards, and objectives are chosen in each school and classroom in conformance with them. Most successful negligence suits have followed from the principle that teachers are expected to take due care of the health and safety of their charges.

Professional malpractice suits might be pursued for two kinds of damage done to students, damage to their cognitive standing and damage done to their emotional or mental health. In Ohio no recovery for emotional injury, absent wrongful intentional acts which are willful and malicious, was allowable.[94] The cases of educational malpractice in this paper all alleged that the cognitive standing of plaintiff students was injured. The charges are not that the affective climate of the school unfavorably affected the students' emotions. The goals of the schools, as implied in the plaintiffs' views are to teach skills to students.

The literature of the 1960's and early 1970's was full of indictments of the schools for being joyless places, where pupils failed, but more seriously, where they were damaged emotionally.[95] The rise of the open classroom was supposed to balance skill objectives with individual creativity, or spontaneity. The curriculum of a nationally highly regarded teacher training institution was designed to help teachers create affectively favorable learning situations.[96] Research shows that there is a significant correlation between self esteem and achievement in school, and that what teachers do in schools affects, to some degree, self esteem.[97]

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[93] San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 27-28 (1973). *But see* Mr. Justice Marshall's dissent at 96.

[94] Carroll v. Lucas, 313 N.E.2d 864 (1974).

[95] *See e.g.* N. Hentoff, Our Children Are Dying (1966).

[96] C. Silberman, Crisis In The Classroom, The Rethinking of American Education (1970).

[97] N. Ozurumba, An Examination of the Variables Influencing The Scores of Rural Elementary Schools on Self Esteem (1978). (Unpublished Ph.D. thesis in Pennsylvania State University library).

Public policy is not clear as to whether the main role of elementary and high schools is to prepare students for occupations, for higher education, or whether schools are to socialize students. Schools are very effective institutions for socializing children to certain values, among which are the student groups' own emergent value system.[98] Paramount in nearly all elementary and secondary schools is the pupil control theme.[99] Pupils must behave or suffer the consequences. Public policy does not appear to treat schools as mainly centers of intellectual formulation. Public policy allows for a mixing of noncognitive or nonintellectual objectives with cognitive. What dominates in the mix is not often clear.

Malpractice suits, if they are successful in obtaining extensive damages for cognitive status injury, could force the objectives of schools toward a concentration on skills, and an avoidance of concern for affective, value, or attitudinal formation. Courts in which malpractice suits are tried must judge whether a school has, while being negligent in teaching cognitive skills, attempted to avoid, for example, undue competition which might injure some children emotionally. A concern of educators for many years has been the stimulation of anxiety levels by assigning students tasks which are in excess of their emotional abilities.[100] Balancing the right amount of anxiety to keep pupils motivated while not frustrating some pupils is necessary in planning objectives and activities.[101] The balance of objectives in each classroom is not defined by public policy, but courts and legislative bodies keep readjusting the existing balance by adding new policy goals with which educators must comply. Desegregation, accommodating exceptional children in the least restrictive environment,[102] bilingual education for a non-English speaking student,[103] are goals which public policy, not the professionals or board members, directed to be part of the school's purposes. The advice of Jencks, who concluded that achievement is the result of mainly non-school influences was that, since the schools are compulsory, they ought to be made more interesting places, and great effort ought to be made to raise family income rather than to wait upon school effects to raise family income.[104]

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[98] C. Bidwell, *The School as a Formal Organization*, in The Handbook of Organizations 972-1022 (1965). *See also* W. Waller, The Sociology Of Teaching (1932).

[99] D. Willower, T. Eidell, & W. Hoy, The School and Pupil Control Ideology (1973).

[100] S. Sarason, Anxiety in Elementary School Children: A Report of Research (1960).

[101] T. Weiss, K. Hoover, M. Belok, & D. Mills, Psychological Foundations of Education at 468-469 (1963).

[102] Act of Nov. 29, 1975, Pub. L. No. 94-142, (20 U.S.C. § 1401).

[103] Lau v. Nichols, 414 U.S. 563 (1974).

[104] C. Jencks, Inequality: A Reassessment of The Effect of Family and Schooling in America (1973).

Respondents in Malpractice Actions

Who are the respondents in professional malpractice action? The school district and its officers and employees are often joined as defendants in tort laws. This is permitted where it can be found that they had a joint duty; the weight of authority allows it.[105] It is a procedural convenience which is in accord with a policy discouraging multiplicity of suits.[106] Separating responsibility of the individual teachers of a plaintiff, and identifying their tortious acts as being contrary to their responsibilities as outlined in law and regulation, is a difficult process.

Schools as organizations mainly instruct pupils as groups, measure their achievement in groups, and hold teachers responsible for groups. Individual students receive attention insofar as it is necessary and possible for accomplishing learning objectives. The direction of more recent pedagogical development has been toward individualizing instruction, but this trend is not to be construed as changing the nature of teacher assignments away from groups. The idea behind individualized instruction methodology has been to provide means of allowing for diagnosis and assignment of each individual within a group.[107]

A pervading philosophic bias in American education is behaviorism. A stimulus in a laboratory setting elicited a response from a child. Behavioristic psychology, based on laboratory experimentation, seems to imply that the teacher is the first or main cause of learning.[108] Learning is a one-way process of cues and rewards going from teacher to student. The malpractice suits appear to rest on that philosophical premise. Assuming that is a sound premise, a choice must be made, in order to sort out the causation of injury, of a model of causal influence in the classroom for apportioning responsibility for injury. Among the possible causal models are teacher centered (teacher presenting directly to student and at times via teaching materials), technology (material teaching the student, with teacher as monitor), large group which is the most frequent and oldest (teacher presenting to many students), and mixed model (teacher presenting to small groups and tutoring some individuals). A model of causal influence implies the possibility of apportioning the effects of the teachers' instruction for the student's achievement.[109]

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[105] W. Prosser, Handbook of The Law Of Torts § 47 at 295-296.

[106] *Id.*

[107] J. Block & R. Burns, *Mastery Learning*, 4 Review Of Research In Education 3 (1976).

[108] H. Walberg, *Psychology Of Learning Environments*, 4 Review Of Research In Education 142, 156 (1976).

[109] *Id.* at 157-158.

There are, in addition, to the causal influence models, organizational models of teaching, which impact the matter of responsibility for injuries:

1. The injured plaintiff who is a member of a classroom with the same teacher all day is the simplest case of fixing responsibility. The teacher is supervised by the principal and accountable to the district for her acts. All the students are in one grade. This school model dates from the demise of the rural ungraded school, but is gradually giving way to others. It exists only in elementary schools. The classes of which the plaintiff is a member has the same teacher all day long.
2. The injured plaintiff who has several teachers, in succession, for various subjects. In this model, the teacher who is responsible for teaching a skill would be respondent. The members of the class may:
    a. Change from one period to the next (common in middle and high schools) or,
    b. Constitute a cohort with all class members intact, changing only teachers each period. Elementary schools are using this model, increasingly.
    c. Change with the teamed teachers remaining together.

The assignment of responsibility for injury becomes problematical, using the second and third models, because the teacher-to-student influence cannot be easily determined.

Apart from organizational considerations, the philosophers and psychologists are not in agreement on the nature of the learning process as a simple behaviorist formula. The pupil as recipient of rewards or target for objectives is a popular notion in American psychological circles. Other notions of the pupil as active learner responsible for his own progress, with a structure of learning peculiar to him, have been popularized in Europe and are gaining more attention in the United States. Suffice it to say that there are contending camps of learning theory, only one of which, the behaviorist, would appear to support a cause of action for educational malpractice.

The choices of model of grouping teachers and students, and the role of teachers are determined by the employer school district. Control is the essential element in the master-servant relationship.[110]

The choices of control and supervision of employees of the district is potentially large in malpractice cases. The district's policy establishes not only the model of teaching, and supervises teacher behavior in accord with the model, but the perception of the pupil's growth in achievement is a function of what the learning process is deemed to be in the district. Emphases on pupil growth in skills or values are balanced according to district policy.

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[110] 53 Am. Jur. 2d. Master and Servant § 2 (1970).

Because school districts are defendants along with teachers, and they are legally responsible for the acts of the employees, the employer's liability for negligent acts is a matter for the court to decide. One case exemplifies the theory that common law liability must find its basis in the negligent conduct of the employee, therefore the care exercised by the employer in selecting the employee is irrelevant to the issue. In one case the board of education and superintendent were found to be immune from suit for negligence in hiring a principal who allegedly committed homosexual attacks upon a minor student.[111]

However, substantial authority exists to the effect than an employer may be liable to a third person in hiring or retaining an employee who is incompetent or unfit.[112] Proof of proximate cause of the employee's acts for the injury to the third party would have to be shown. If the employee is acting within the scope of her employment, the employer's liability is established. A separate cause of action may exist if the employer knowingly hired and retained an incompetent employee.[113]

The care incumbent upon supervising teachers is, in certain cases, specified by law. Some states, such as Pennsylvania, require periodic evaluation of tenured as well as non-tenured teachers.[114]

Lacking proof of supervising and rating teachers, a district could be charged with neglect to third parties in not observing or correcting negligent teaching. A systematic supervision and rating system would seem to be a defense offered by the district against its negligence. An even stronger defense would be proof that the district had actually dismissed teachers, denied them pay increases, or demoted administrators for inefficiency and ineffectiveness documented according to procedural due process safeguards.

There are many examples of districts dismissing teachers for incompetence. The incompetence charge is often combined with others, such as lack of control of pupils. In a Pennsylvania case, before teacher ratings became obligatory, a teacher was dismissed for failing to maintain proper discipline, and in comparison with grades seven and eight in similar schools of the same county, through his alleged incompetency, the grades of those pupils were much lower than grades of pupils in the dismissed teacher's classes, according to standardized tests given by the County Superintendent of Schools. The board acted, in the dismissal, within the positive law of the state.[115] Soon after, in another case, the court did not uphold the dismissal of a teacher for incompetence, as none of the charges were upheld at a hearing. The one piece of evidence presented by the district, that only one-third of the students passed the eighth grade examinations, was called unreliable, as factors other than teaching might have accounted for the failures.[116] No ratings were then required by law.

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[111] Galli v. Kirkeby, 248 N.W.2d 149 (1977).

[112] 53 Am. Jur. 2d § 422 at 436 (1970).

[113] *Id.* at 437.

[114] Pa. Public Sch. Code § 1123 (1949), as amended. The rating must be done each year, by means of a state rating scale, under the superintendent's direction, or by a person delegated by the superintendent of schools. The annual ratings are necessary to support charges of incompetency prior to dismissal or suspension of teachers.

Where ratings are required by statute, a teacher could not be dismissed without a rating. Since no rating was made, in one case, the court construed the teacher's performance as satisfactory.[117] A court added the requirement of anecdotal evidence in addition to low ratings on the state rating scale, without which it would not uphold the dismissal of a teacher for inefficiency.[118]

Once the doctrine of governmental immunity to liability is abrogated, the doctrine of *respondeat superior* becomes applicable to school districts. [119] The Pennsylvania court which abolished immunity declared that "no public policy considerations presently justified its retention."[120] It declared that there was little support for the concern that courts would be flooded if the doctrine were abandoned. What could happen was not seen to be an issue, only the matter which was before the court.[121]

Immunity from professional negligence is no longer recognized in most jurisdictions. Negligence as a proximate cause of the plaintiff's injury must be proven, so waiving of governmental immunity is not an open sesame to all potential claimants.

RELATIONSHIP OF SCHOOLING TO OCCUPATION AND INCOME

A third consideration of public education policy bears on the matter of injury to the plaintiff. It is the relationship of schooling to occupational status and income. The high school graduate who claims injury because he is denied entrance to jobs which he had a right to expect because of holding diploma must prove:

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[115] Kiebler's Appeal, 30 Pa. D & C 620 (1936).

[116] Gulich Twp. School District v. Korman, 31 Pa. D & C 197 (1937).

[117] Elias v. Board of School Directors of Windber Area School District, 218 A.2d 738, Sup. Ct. of Pa. (1966).

[118] Newcastle Area School District v. Baer, 28 Pa. Commonwealth 240, 368 A.2d 345 (1977).

[119] Mancke, *Liability of School Districts for the Negligent Acts of Their Employees*, 6 J. L. Educ. 1 (1972).

[120] Ayala v. Philadelphia Board of Public Education, 453 Pa. 584, 592 (1973).

[121] *Id.* at 597.

1. The set of opportunities he could enter on the basis of his diploma and supposed preparation. This set is a function of his age, also.
2. That subset of jobs in number one, above, which he could enter but for the negligent teaching. This requires identification of those skills he is assumed to have and is entitled to have because of his diploma and years in school, but doesn't have.
3. The difference between set one and subset two. The remaining subset of one which is still open presumably has a lower average monetary value than one alone.

The above steps are oversimplified. More importantly, they assume a steady state to the economy, or a linear progression. Neither a steady state nor a linear progression of job trends is warranted for predicting the economy for the remainder of a person's productive years. Macroeconomic variables cannot be ignored in assessing a person's return or value to the economy. Changing economic public policy appears to be forcing such changes as more frequent retraining, later retirement, less differentiation in salary in some industries according to formal preparation with more dependence upon on-the-job training, and more emphasis upon certain kinds of experience for entry.

The conventional wisdom in the economics of education after World War II concentrated upon the effects of schooling, including rates of return. Studies of manpower requirements were matched with outputs of schooling in many developing nations.[122] Simply put, the relationship of schooling to income in one's occupation over a lifetime was correlated highly. The approach neglected the effects of investments in oneself such as on-the-job training, creativity exhibited by the person in the job, motivation, and enlarged or constricted opportunities in the job environment. Research appears to confirm the economic returns of schooling in the U.S. More schooling appears to predict a higher income, but the interaction between the intervening variables and other predictor variables needs a great deal of testing. However, the research in the economics of education is no longer so simple and definite that more schooling alone is a predictor of success in one's occupation. One's socio-economic background, investment in one's self, on-the-job train ing, and most of all the job skills market are increasingly seen as powerful determinants of post school success.[123] How much difference there is between a job and related income for a high school graduate which is the result of non-negligent teaching, and those jobs which are not open to high school graduates who have been negligently taught appears to be a difficult question to answer, but is relevant to malpractice suits in the Peter W. genre.

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[122] F. Welch, *Relationships Between Income and Schooling*, 2 Rev. of Research in Education 179 (1974).

The opportunities for jobs with varying amounts of skills required for entry appear to be at least arguably as much a function of economic growth, capital investment, and public economic policy. Defense can be offered by a district by reference to the practice of firms awarding jobs to those with higher educational background, regardless of the need for such education. A class civil rights suit against an employer who insisted upon entry skills higher than necessary for carrying out the duties might as reasonably be considered as bringing action against a school district.

Assessing damages for future consequences of the injury to the plaintiff will be more difficult to prove as more possibilities for training are made available through CETA and other such efforts. Instead of an award of money damages, an injunction to place the person or class of persons in special job training programs with appropriate counseling might be preferable. Public policy should call for coordination between schooling and job entry instead of reimbursement for damages, the latter which benefits only a few. Coordination between schools and special job training efforts has not been spectacularly effective. The relationship between school and job placement is a worthy concern of courts which review cases of alleged malpractice.

THE HOFFMAN CASE

The Daniel Hoffman case has been distinguished by the New York Appellate Division from the Donohue case.[124] Daniel Hoffman as a six-year-old was given a Stanford-Binet test, scored an IQ of 74, and was assigned to a class for children with retarded mental development. The cutoff point for entrance to the class was 75. The psychologist expressed some doubt about the borderline finding, and expected the boy to be retested within two years, in accord with the New York School District's policy of retesting retarded children every two years. The retesting was not done. The child had been tested with a nonverbal test of intelligence at the age of four, and scored an IQ of 90, which is within the normal range of intelligence. After being educated in mentally retarded classes for more than 12 years, the plaintiff scored an IQ of 94 on the Wechsler Adult Intelligence Scale at age 18. Expert testimony held that the student was damaged by being treated so long as a retarded student, when in fact he was not retarded. Hoffman never was retested by the school district in spite of district policy requiring it. The defendant district claimed that he was constantly reevaluated, however. The court concluded that the district was negligent in not retesting the student. The court agreed with the commentary on the case by Professor Diamond:

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[123] M. Bowman, *Learning and Earning in the Post School Years*, 2 Rev. of Research in Education 202 (1974). *See also* Jencks & Brown, *Effects of High Schools on Their Students*, 45 Harvard Education Review 273 (1975).

[124] Hoffman v. Board of Education of the City of New York, App. Div., reported in N.Y. Law J. 1, Nov. 14, 1978, *on appeal* from Sup. Ct., Queens Ct. Nov. 3, 1976.

> The thrust of the plaintiff's case is not so much a failure to take steps to detect and correct a weakness in a student, that is, a failure to provide a positive program for a student, but rather, affirmative acts of negligence which imposed additional and crippling burdens upon a student" and that "it does not seem unreasonable to hold a school board liable for the type of behavior exhibited in Hoffman.[125]

Justice Damiani, who wrote the Donohue opinion, citing that opinion, argued in his dissent that the case should be dismissed for lack of showing a cause of action to recover for educational malpractice. Justice Shapiro, writing the opinion for the majority, in classifying the action as negligence, explicitly disagreed with the Damiani position that it fell into the line of educational malpractice suits.

CONCLUSION

The key case cited in succeeding cases was the Peter W. case in California. Cases alleging educational malpractice have not established a cause of action. The plaintiffs have not been able to prove a duty of care of the schools to the plaintiffs, either that of the professional standard, or the statutory or constitutional standard of care. The cases have not established injury to the plaintiff, or that the alleged injury was caused by the behavior of the district professional employees. The charge which might have come closest to providing a cause of action was that of misrepresentation of facts to the plaintiff (Peter W.), but he failed to prove injury as a result.

Statutes which become more prescriptive in their directions to school districts might allow the plaintiffs in future cases to establish a statutory duty of care to students.

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[125] *Id.* at 16. Reference to D. Diamond, *Education Law*, 29 Syracuse L. Rev. 103 (1978).

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Public educational policy is tested in tort negligence cases. Policy is specific to states and even varies between districts in some states. Many approaches exist for failed students or injured students to reach the next educational or occupational step. Goals of schooling are many, hence many defenses are open to districts which are charged with negligence in preparing students in cognitive skills. Overemphasis on cognitive development might cause injury to certain pupils with anxiety problems. Noncognitive objectives, if they are chosen by the district, must be balanced against attention given to cognitive variables. Schools have not been seen only or mainly as job preparation agencies, but more as self-contained institutions.

Public policy has not forced schools to maintain the highest level of science, but use of feedback information has been indicated as part of effective teaching for many years. Lack of feedback use might support a cause of action for misrepresentation. Some statutes require feedback to students but do not necessarily allow for injury for failure to do so.

The assignment of responsibility for negligence must take into account the model of teaching. The tradition of an individual assigned to one group all day is easiest for fixing responsibility to one teacher, but that model is giving way to teamed models.

Among approaches to learning, the behaviorist is the one which appears to underlie the cases. The pupil receiver of clues or rewards presupposes little activity on the part of the learner. If other models are used which involve learners more actively, negligence may be even more difficult to prove. In accounting for the influence of instruction, and controlling all other variables, the methods used all have limitations. A district answerable in negligence cases under the *respondeat superior* doctrine, should show supervision of teachers and evaluation of them. If it has demoted ineffective teachers, it is a defense against negligence.

The correlation between education and job placement and income is no longer as high as had been supposed. Greater importance of personal variables and macroeconomic variables, as well as the employer's behavior, account for more success on the job and entry to good jobs has been found.

Educational malpractice allegations, given the foregoing commentary, will probably not become easier to prove. Other legal theories may be used to force districts to improve incompetent teaching, among which is injunctive action to coordinate school activities with job placement. Schools have been accused of being inhuman as well as inefficient. If the schools must concentrate more on efficiency in imparting skills, let us hope they will not be encouraged to drift into even less concern for humaneness to pupils.

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Prohibited Practices in Collective Bargaining in Public Education

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INTRODUCTION

Collective bargaining for educational employees is regulated by state laws in the individual states. The principal purpose of a state law governing labor management relations in the public sector is to grant certain rights to public employees and employers. Included in these employee rights are the rights to organize, to bargain collectively and to engage in lawful concerted activities for the purpose of collective negotiation or bargaining through representatives of their own free choice. To protect employees in the exercise of these rights, a statute, as a general rule, contains a provision enumerating rights granted to the employees and protected by the statute. It also contains provisions that prohibit conduct by employers, by unions, or both in conflict with the exercise of these rights. Such conduct is commonly called a prohibited practice, an unfair labor practice or an improper practice. These terms are used interchangeably in this paper. The term "prohibited practice" refers to the conduct of a public employer, or a public employee labor organization, which constitutes a breach of statutorily imposed rights or obligations.

The employee rights provisions for public employees generally parallel the language of the National Labor Relations Act (NLRA), which applies to private industry. The federal law declares:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activity for the purpose of collective bargaining or other mutual aid or protection.

Language in state statutes uniformly grant employees the right to join organizations and to bargain collectively. Like the NLRA, many include the right to form or assist unions, as well as the right to engage in concerted activity unrelated to union organization. For example, a demand by a group of employees for a wage increase may be activity protected from reprisal, even though no union is involved. Many of the state laws also guarantee an individual right to present grievances, despite the presence of an exclusive bargaining representative.

Prohibited practices by public employers generally parallel those enumerated in the National Labor Relations Act. Employers are prohibited from 1) interfering with, restraining or coercing public employees in the exercise of their rights guaranteed by statute; 2) from initiating, creating, dominating, contributing to, or interfering with the formation or administration of a labor organization; 3) from discriminating in regard to hire, term or other conditions of employment in order to encourage or discourage union membership; 4) from discriminating against public employees for giving testimony or instituting proceedings under the Act, and 5) from refusing to bargain with representatives of its employees.

State statutes sometimes specifically exempt a finding of an unfair labor practice for certain employer actions. For example, the Michigan Public Employees Relations Act permits employees to confer with employers during working hours without loss of time or pay, and allows for an agreement with a labor organization requiring, as a condition of employment, that all employees in the bargaining unit pay to the labor organization a service fee (agency shop).

In many statutes, a state agency (board or commission) has been given exclusive jurisdiction over all prohibited practices and determines what, in a specific case, is an unfair labor practice. These agencies undertake, on a case-by-case basis, to interpret the public employee bargaining statute. State statutes do not delineate or enumerate each specific action that was to be considered an improper practice. These statutes follow, in many respects, certain language in the National Labor Relations Act. In Michigan, the Employment Relations Commission and State Court have followed interpretations given to similar NLRA language.

> In construing the Michigan Labor Mediation Act and the Public Employees Relations Act (PERA), this court has frequently been guided by the construction placed on analogous provisions of the NLRA, by the NLRB and the Federal Courts.[1]

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1. Rockwell v. Crestwood School District, 393 Mich. 616 at 636 (1975).

However, the federal statute is not necessarily compelling authority for state agencies:

> Even though a state public employee relations act defines collective bargaining in language similar to that utilized by the National Labor Relations Act, decisions interpreting the federal statute will not necessarily provide compelling authority for the resolution of issues concerning mandatory and nonmandatory bargaining subjects under the state statute; rather the wiser course would be to resolve bargaining subject disputes on a case by case basis prior to developing overall principles in the area.[2]

Obviously, state courts and/or public employee relations boards are forced to develop case law to accommodate statutory variations. States are free, apart from preemption by Congress, to characterize any wrong of any kind by an employer to an employee, whether statutorily created or known to the common law, as an unfair labor practice.

However, state teacher bargaining laws do not confer upon teachers a right to seek through their teacher organization the right to correct every complaint against the school district.

> The teacher bargaining law's provision for protected activity does not confer upon an individual teacher any right to seek, through his bargaining representative, redress for his individual grievances with his school employer. Protected activity refers to individual activity, or activity in concert, which attempts to further the interests of all members of the bargaining unit, not individual grievances. Therefore, when a union president solicited support of parents and pupils on behalf of a nontenured teacher on his nonrenewal, the union president was not engaging in protected activity.[3]

Enforcement and Remedies for Prohibited Practices

Enforcement of the unfair labor practices provisions is generally reserved to the state public employee relations board or commission. Such conduct may be prevented by a "cease and desist" order enforceable in a court of law. The Wisconsin statute is a good example.

> Grant of statutory authority to WERC to prevent commission of prohibited labor practices incorporates provisions of

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[2] Pennsylvania Labor Relations Bd. v. State College Area School Dist., 337 A.2d 262 (1975).

[3] Indiana Educ. Emp. Rel. Board v. Board of School Trustees, 368 N.E.2d 1163 (Ind. App. 1977).

> municipal employment statute, not merely for procedural purposes, but for substantive remedial purposes as well.[4]

It is the author's opinion that public education collective bargaining can be satisfactorily regulated under private sector concepts defining prohibited practices. A state public employment relations board is usually quite capable of deciding, on the basis of private sector precedents and public sector bargaining experiences, which practices are prohibited. The case-by-case decision-making approach on unlawful practices is vastly superior to a rigid legislative listing of specific prohibited practices. If experience proves the initial decision to be incorrect, it is easier for a state commission to reverse itself than it is to get a modification of a state statute in the legislature.

PROHIBITED PRACTICES: FORMATION AND OPERATION OF THE UNION

Domination and Interference of Employee Rights by Public Employment Relations Statutes

Criteria for finding of domination.

It is recognized that public employers necessarily act through individuals; such individuals are, consequently, sometimes charged with the interference and domination of others. Whether an employer is chargeable in a particular instance depends on the facts.

The general rule has developed that an employer is guilty of an unfair labor practice whenever his support or domination of a union has reached the point where it is reasonable to infer that the union is not truly the employees' representative in disputes arising between the employer and his employees.

Many factors are considered in determining whether an employer has been guilty of domination or interference. The extent and character of employer participation in a labor organization varies from case to case. Domination may result from some or all of the following activities: (1) employer financing of union activities; (2) active participation in union affairs by the employer or its executive and/or supervisory personnel; (3) membership in the union by non-bargaining unit supervisory and executive personnel of the employer to an extent that influences the outcome of union elections and union policy decisions; (4) solicitation of membership by executive or supervisory personnel of the employer in one union where more than one union is contending for representation of employees; (5) the use of threats or coercion by the employer to influence membership in one union or opposing membership in another union where two more unions are contending for representation of the employees; (6) the furnishing of facilities or services to a union by the employer; and (7) discharging or invoking other sanctions by the employer against employees for union activities. It is rare that any one of the practices listed above would constitute the sole basis for a finding of statutory violation.

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[4] Wisconsin Emp. Rel. Commission v. City of Evansville, 69 Wis. 2d 140, 230 N.W.2d 688 (1975).

The proper remedy for a finding of domination is disestablishment. Such a finding will result in the union being permanently prohibited from representing employees of the employer who dominated the organization. However, where the evidence establishes only interference with protected activities, or assistance to an organization, but falls short of establishing real domination, a disestablishment order is inappropriate.

In *Livonia School District*,[5] MERC directed the school board to cease and desist from recognizing a local of the American Federation of State, County and Municipal Employees because it included supervisors. The Commission stated:

> Active supervisory participation in the leadership and bargaining of the Intervenor (AFSCME) is so clearly a violation of Section 10 (b) that no explanation of our finding need be made. This interference is substantial (4 of 20 members of the negotiating committee were supervisors, including Intervenor's President and Vice President) and created the strong impression that the employer was sitting on both sides of the bargaining table.

Interference by executives and supervisors

Employee organizations should be free from the taint of employer interference by its executives and supervisors in the administration of the union.

Public employees must be completely free to choose their own representatives and to bargain collectively and employers may not impair employees' freedom of choice. Overt action by a public employer or one of its agents which gives advantage to a particular employee organization is an unfair labor practice since it constitutes improper interference with employee freedom of choice. It is mandatory that an employee organization function for the employees in collective bargaining rather than as a tool of the employer in frustrating real collective bargaining. Legislatures intend that public employees have the right to bargain through representatives of their own choosing. If an employer has control over the organization which sits at the other side of the bargaining table, collective bargaining is a sham.

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[5] 1967 MERC Lab. Op. 780 & 1968 Lab. Op. 202.

Public employment relations acts do not prohibit executive and supervisory personnel from *belonging* to an organization which represents employees for purposes of collective bargaining. However, they may not hold union office, vote in union elections, attend internal business and/or labor relations meetings or engage in any other activity on behalf of such organization.

The attendance by supervisors and executives at social affairs or participation in training programs sponsored by the employee organizations is not a violation. Nor is it a violation for a supervisor to wear a union pin or insignia or post the union's sticker on his office door since an employer is free to indicate his preference between competing organizations, absent threats or promises of benefit.

Employer conduct prior to certification of bargaining agent.

A disparity of treatment of rival organizations during an election campaign is improper assistance to guaranteed organizational rights. It is an unfair labor practice if an employer publicizes meetings of a favored organization, permits its members to campaign freely during working hours, and allows its literature to be displayed in the employer's office while preventing the rival union from circulating its membership information to new employees. The solicitation of membership in an employee organization by supervisors or the attempt to solicit employees to obtain insurance coverage conditioned on membership in an organization is an unfair labor practice. It is not a prohibited activity if a school board provides free office space, free heat, free light and use of telephone facilities to unions on a nondiscriminatory basis.

A public employer is not required to allow the distribution of organizational campaign materials in his internal mail system; however, if, during a representation campaign, one organization is allowed the privilege of placing materials in the employer's mail system while the privilege is denied to others, a finding of discrimination is warranted. A policy prohibiting the distribution of any material through the public employer's mail delivery system without prior approval of the contents, even though not discriminatorily applied, constitutes interference with, and restraint of, the employees in the exercise of their self-organizational rights. A public employer cannot restrict the distribution of labor relations material by employees during non-working time in non-working areas, but may properly prohibit distribution of such materials outside the employer's buildings on his property or in hallways during employees' working hours.

Employer conduct after certification of bargaining agent

Once a question of representation has been resolved, and the exclusive bargaining agent determined, it is not improper for the employer to accord institutional advantages to the organizational representative. A public employer may grant, through bargaining, to the certified bargaining agent of its employees the exclusive use of payroll deductions of dues, bulletin boards, and mailboxes, meanwhile denying such advantages to a rival organization when the question of representation has been resolved in favor of one or two rival organizations as equals. An employer's granting of convenience of communications helps the exclusive representative communicate with the people it represents. However, a rival organization may engage in activities to promote membership in its organization during the employer's own time and uring a period when a new representation petition has been filed. In this period, advertising activities are authorized.

Case Digests—Interference and Domination

Employer legally limited unions use of school facilities

A school board policy limiting a union's use of school mailboxes and bulletin boards and limiting meetings of the union with teachers to designated areas did not unconstitutionally infringe upon the union's First Amendment rights of free speech and free association since school principals were required to designate space for such conferences and to post notices of the time and location. Also since school mailboxes and bulletin boards and primarily for the purpose of internal communication among teachers regarding school related subjects and were open to the public, there was no constitutional obligation to let any organization use them. Alternate means of communication existed for the union.[6]

A college employer that had previously rented its classrooms to civic groups did not discriminate against unions by refusing to rent it a classroom for a meeting since employer had never rented any of its classrooms to unions. Employer's action did not deprive the union of only reasonable means of communicating with the employees.[7]

An employer university was not guilty of an unfair labor practice under the PERA for refusing to allow an association of university professors to use the university's mailing and addressing facilities to disseminate its views on collective bargaining even though the employer had utilized these facilities to conduct an anti-union campaign. The court found the refusal analogous to refusing to furnish addresses of employees, which had been held not to constitute an unfair labor practice in a prior decision.[8]

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[6] Geiger v. Duvall County School Board (Fla. Dist. Ct. App., 1st Dist., No. DD-464, March 30, 1978).

[7] St. Petersburg Junior College v. Public Employees Relations Commission (Fla. Ct. App., 1st Dist., No. HH-62, April 25, 1978).

Employer interfered with supervisor's organization rights

Department heads, as first level supervisors, were entitled to *membership* in employee associations, but could not be included in the same bargaining unit as teachers who were bargaining. School district's action in requiring department heads to choose between remaining as department heads or retaining their membership in employee associations constituted attempt to interfere with department heads in exercise of their rights and, as such, was unfair practice.[9]

Photographic surveillance found to be interference

An employer's photographic surveillance of union members lawful picketing interfered with the employees' rights to engage in union activities, even though the photographs were not used to retaliate against the picketing employees. The act of photographing itself tended to intimidate and restrain the affected employees, and the employer's asserted justification—to compile a historical record of the event—was insufficient.[10]

PROHIBITED PRACTICES: DISCRIMINATION IN EMPLOYMENT

Discharge

Introduction

Public employees have a statutory right to form, join, and assist employee organizations, and to participate in collective negotiations free from employer interference, restraint or coercion. An employer, on the other hand, has the right to maintain control over his employees in the interest of discipline, efficiency, and public relations. Since discrimination is something of a "catchall" unfair labor practice, a finding that the employer "dominated," or "discriminated" will also support the inference that he "interfered, restrained or coerced" in contravention of the state's public employee statute.

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[8] American Ass'n of Univ. Professors v. Penn Labor Relations Board (Penn. Ct. C.P., Centre Cty., No. 14, Nov. 7, 1974).

[9] Pennsylvania Labor Rel. Bd. v. Eastern Lancaster Cty School Dist., 315 A.2d 382, 11 Commw. Ct. 482 (1975).

[10] Escambia Cty. Sch. Bd. v. PERC, (Fla. Dist. Ct., 1st Dist., No. CC-245, Oct. 14, 1977).

At times these employee-employer rights collide. For example, an employee may be discharged for one of two reasons: (a) violation of a valid school board rule or (b) union activity. The former is given by the employer as the reason for severance; the latter remains unstated on his part, causing the employee or oganization to file a prohibited practice charge. In these *dual motive* cases involving job discrimination the critical proofs go to the question of motivation.

Motivation critical in proving discrimination

The state agency is limited to considering and judging whether a public employer was motivated to discriminate against an employee because of his membership and activities in a labor organization. The motivation of the employer is the crucial question. Mere suspicion, or a feeling that the employer's actions "smell wrong" is not enough. Without some affirmative evidence of antiunion activity, mere weakness of the employer's defense does not satisfy the burden of proof. The determination that the discharge was motivated by union animus is an element essential in finding a violation.

Specific "proof of intent" is unnecessary where the employer's conduct inevitably produces results that are prohibited. Although an employer may insist that he did not intend either to encourage or to discourage union membership or did not intend to proscribe the exercise of employee rights guaranteed under the law, yet where his actions result in such a violation, it is presumed that he intended the certain consequences of the act. The discriminatory intent may be established by direct evidence or by inference from other proven facts. It is not necessary to prove the employer's state of mind; competent circumstantial evidence may support the necessary inference.

Burden of proof in discrimination cases

In discrimination charges, the charging party will have the burden of proving that the employer's action was for participation in activity protected by the statute. It is incumbent upon the charging party to produce evidence that the employer was motivated by animosity toward the union in discharging the employee. The charge of a violation must be supported by a preponderance of the evidence, which must be convincing, that the public employer was motivated by the employee's union activity. (See Mt. Healthy test below.)

State agency limited to considering anti-union activity in discrimination cases

The state agency has neither the right nor the authority to pass on the sufficiency of cause for discharge of an employee but may look to the alleged cause in determining the reasons advanced were used falsely or whether the actual reason for discharge was the union or concerted activities of the employee.

Statutes do not give the public employment relations agencies broad powers to determine whether a discharge violates the due process clause of the 14th Amendment or the Civil Rights Act of 1871; nor can it duplicate the role of a teacher tenure commission and determine whether the dismissal was for reasonable and just cause. The agency cannot fulfill the role of an arbitrator to determine whether the employee was treated unfairly or in an unprofessional manner.

The agency cannot pass upon the validity, propriety, or soundness of the decision to discharge an employee or whether just cause existed for the action taken against him. An arbitrary dismissal which does not violate the statute cannot be set aside by the Commission. it is not a violation if a public employer goads an employee into quitting in order to save money or because the employee was considered to be incompetent.

Miscellaneous discrimination decisions

Employees, to be protected, must act together in concert; an employee acting alone may be legally discharged for continual complaining. A school bus driver continually complaining that the busses were not safe for children was not protected since his complaint was not about the condition of the bus drivers' employment.

The agency may, in discriminatory discharge cases, inquire into the suitability of the discharged employee for reinstatement for it will not enforce renewal of a relationship which bodes ill for all concerned.

While the timing of a discharge may be a factor in determining whether the employer has discriminated against or interfered with an employee's rights, it is not in itself proof of violation.

If an employee is forced to resign because of his union activity, his separation may be treated as a "constructive discharge, and a violation of a collective bargaining statute.

The Mt. Healthy Test

The courts and state employment relations agencies follow the *Mt. Healthy* decision in determining discharge cases

> The burden of proof is on the discharged employee to show that his conduct was constitutionally protected, and that this

conduct was a substantial factor—motivating factor—in the school board's decision not to rehire him. If the employee carries the burden, the Board must show by a preponderance of the evidence that it would have reached the same decision even in the absence of the protected activity.[11]

Application of *Mt. Healthy* Test

Applying the *Mt. Healthy* Test, the court remanded that portion of the hearing officer's order which found three teachers were discharged for union activity. The "but for test" is described below:

> The constitutional principle at stake is sufficiently vindicated if such an employee is placed in no worse a position than if he had not engaged in the conduct. A borderline or marginal candidate should not have the employment question resolved against him because of constitutionally protected conduct. But that same candidate ought not to be able, by engaging in such conduct, to prevent his employer from assessing his performance record and reaching a decision not to rehire on the basis of that record, simply because the protected conduct makes the employer more certain of the correctness of its decision.[12]

Discharge for Lawful Concerted Activity Prohibited

Generally

PERA does not proscribe breach of collective bargaining agreement or unfairness, and employment may be terminated for good reason, bad reason, or no reason at all, but an employee may not be discharged for engaging in lawful concerted activity. An employee cannot be discharged for attempting in good faith to enforce a right claimed under a collective bargaining agreement.[13]

A school board discriminatorily discharged an employee who would have been retained "*but for*" his union activities. The Board's good faith in acting upon the superintendent's tainted recommendation did not insulate it from the impermissible motive.[14]

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[11] Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274 (1977).

[12] Pasco Cty Sch. Bd. v. Florida PERC (Fla. Dist. Ct. App., 1st Dist., No. CC-38, 1977).

[13] Michigan Emp. Rel. Comm'n v. Reeths-Puffer School Dist., 215 N.W.2d 672, 391 Mich 253 (1974).

[14] Columbia Cty. Bd. of Pub. Instr. v. PERC (Fla. Dist. Ct. App., 1st Dist., Nov. 16, 1977).

School board had averaged one teacher dismissal each year and suddenly three who were union officers were discharged in one year. School board's reasons for dismissal were pretexts and the real reasons were union activities. Board had no justifiable reason for discharging the teachers.[15]

Incompetent employees discharged for union activity

An employee may not be fired when one of the motivating factors is his union activities, no matter how many other valid reasons exist for firing him.[16]

Actions of supervisory personnel are attributable to the board of education.

Probationary (non-tenured) employees protected

Probationary teachers who perform satisfactorily and would not otherwise be granted tenure may not be denied tenure because of union activities; however, union activity does not provide a shelter for a teacher whom the board decides not to retain for bona fide reasons.[17]

A college discriminatorily refused to rehire six nontenured teachers—five of whom were union officers—to discourage union membership and activities, not because of poor evaluations or a sudden change in curriculum. The absence of an obligation to rehire the teachers did not permit a denial of employment motived by union antipathy.[18]

Discharge for participation in grievance procedures a prohibited practice

The PERB properly ordered reinstatement of nontenured teachers who had been dismissed by a school board, since they were dismissed because of their active participation as members of a grievance committee. Their principal chastised the teachers for being parties to grievances, and informed them that it would be unwise for a probationary teacher to file a grievance or sign his name to a grievance. The school board was ordered to evaluate the performance of the teachers influenced by any of their union activities.[19]

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[15] Board of Trustees Worthington-Jefferson Consol. Sch. Corp. v. Indiana Educ. Emp. Rel. Bd. (Ind. Ct. App., 1st Dist., No. 1-1277 A 308, May 9, 1978).

[16] Muskego-Norway Consol. Sch. v. Wisconsin Emp. Rel. Bd., 151 N.W.2d 617 (19____).

[17] Tischler v. Board of Educ., 37 App. Div. 2d 261, 323 N.Y.S.2d 508 (19____).

[18] Mid-Plains Ed. Ass. v. Mid-Plains Nebraska Technical College, 199 N.W.2d 747, 189 Neb. 37 (19____).

[19] Sag Harbor Union Free Sch. Dist. v. Helsky (N.Y. Sup. Ct., App. Div., 3rd Jud. Dept. No. 29028, Nov. 24, 1976).

Timing of discharge

Time sequence between union activity and discharge of union member is important consideration in determining whether discharge was motivated by union activities and thus unfair labor practice.[20]

Constructive discharge prohibited

A union of teacher aides had not been granted recognition by a school committee, however, the committee constructively discharged certain aides when it revised the teacher aides program. Recognition of the union was not a condition precedent to the finding of a violation. The purpose of the revision was to make the work economically unattractive and discourage continued employment. Therefore, reinstatement and back pay were proper remedies, since this was the equivalent of a finding of constructive discharge.[21]

Dues Checkoff Arrangements for Minority Union

An employer may not enter into a dues checkoff agrement with a majority union while refusing to enter into similar arrangements with minority unions. An exclusive dues checkoff provision would violate the employer's statutory obligation to avoid encouraging or discouraging membership in any particular union or restraining any municipal employee in the exercise of the employee's right to join a union. Accordingly, an employer does not commit an unfair practice by arranging to deduct union dues from the paychecks of minority union members.[22]

Recognition of Exclusive Bargaining Agent Does Not Unlawfully Encourage Union Membership

While an employer who recognizes duly elected majority union representative as exclusive bargaining agent for all employees has in effect encouraged union membership in majority union to certain extent, such relation cannot be considered prohibited practice as defined by Municipal Employees Relations Act.[23]

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20. St. Joseph Hospital v. Pennsylvania Labor Relations Bd., 330 A.2d 561, 16 Pa. Commw. 553 (19____).

21. School Committee of Stoughton v. Labor Rel. Commission, 346 N.E.2d 129 (19____).

22. Milwaukee Federation of Teachers, Local 252 v. WERC (Wis. Sup. Ct., No. 76-049, June 6, 1978).

23. Board of Sch. Dir. of City of Milwaukee v. Wisconsin Emp. Rel. Comm'n, 42 Wis. 2d 637, 168 N.W.2d 92 (1969).

PROHIBITED PRACTICES: REFUSAL TO BARGAIN IN GOOD FAITH

Duty to Bargain in Good Faith Defined

The obligation imposed upon the employer and the union by collective bargaining statutes is that they will set at the bargaining table and discuss issues with an apparent intent to reach an agreement. A number of statutes and decisions have included descriptions or definitions of the "duty of the bargain in good faith." For example, Section 10(c) of the Michigan Public Employment Relations Act defines the duty to bargain as:

> . . . the performance of the mutual obligation of the employer and the representative to meet at reasonable times and confer in good faith with respect to wages, hours and other terms and conditions of employment as the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract, ordinance or resolution incorporating an agreement reached by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession (MCLA 423.215).

The following cases describe, to a limited extent, the standards of "good faith."

Genuine desire and serious attempt to resolve differences must be present

Placentia Fire Fighters v. Placentia

Under a state statute providing that public agencies shall meet and confer in good faith with employee organizations regarding conditions of employment, good faith is a subjective attitude and requires a genuine desire to reach agreement; the parties must make a serious attempt to resolve differences and reach common ground, and the effort required is inconsistent with a predetermined resolve not to budge from an initial position.[24]

Totality of employer's conduct must be considered

Pennsylvania Labor Relations Board v. Merian Memorial Park

The standard of good faith in collective bargaining must be based on the whole picture of the party's relations and the totality of the employer's conduct must be considered. Bad faith in connection with collective bargaining is a desire or intention not to reach an agreement.[25]

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[24] Placentia Fire Fighters v. Placentia, 57 Cal. App. 3d 9, 129 Cal. Rptr. 126 (19____).

Surface bargaining insufficient

Escambia County School Board v. PERC

A public employer refused to bargain with a union by engaging in surfacing bargaining techniques. The employer's position throughout negotiations that certain issues were nonnegotiable, its insistence on a "total package agreement," its failure to attend meetings and habitual lateness, and its failure to provide the union with relevant information did not constitute "hard bargaining" as suggested by the employer, but rather a failure to bargain in good faith.[26]

Prohibitive practice requires showing of animus

Skaneateles Teachers Association v. New York State Public Employment Relations Board

A school board's unilateral redefining of a bargaining unit during the "challenge period" seven months before the end of a bargaining agreement could not be considered an improper practice in violation of the Taylor Act. Improper practice requires a showing of "animus." With animus stipulated not to be an element in the case, it could not be said the school board's unilateral action constituted interference with employees rights as a refusal to bargain.[27]

Confusion or good intention insufficient defense

Saddleback Valley Educators Assn. v. Saddleback Valley Unified School District

It has been no defense to an unfair labor practice charge that the employer was confused regarding the lawful course of action to take, or even if he believed the action to be correct.[28]

Inability to reach an agreement not necessarily a prohibited practice

Lake Michigan Federation of Teachers v. Lake Michigan College

Fruitlessness of meetings with employer from union's point of view was not controlling on issue whether employer bargained in good faith.[29]

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[25] Pennsylvania Labor Rel. Bd. v. Merian Memorial Park, 178 A.2d 553, 406 Pa. 562 (1962).

[26] Escambia County Sch. Bd. v. PERC (Fla. Dist. Ct. App., 1st Dist., No. CC-245, Oct. 14, 1977).

[27] Skaneateles Teachers Association v. New York State Public Employment Relations Board, 88 Misc.2d 816 (N.Y. Sup. Ct., Nov. 30, 1976).

[28] Saddleback Valley Educators Assn. v. Saddleback Valley Unified Sch. Dist. (EERB 1977).

Obligation of Employer to Bargain Over Managerial Prerogatives

There are important questions related to the range of legally permissible subjects about which the parties must meet and confer or negotiate in the public sector. In most public employee bargaining statutes, the scope of bargaining is derived from the words "wages, hours and terms and conditions of employment." Subjects covered by this phrase are deemed to be mandatory, and the employer must bargain with respect to them. Other matters are either permissive or illegal subjects of bargaining. Bargaining with respect to permissive subjects is discretionary for both parties, and neither is required to bargain in good faith to the point at which agreement or impasse is reached. The parties are not explicitly forbidden from discussing matters which are illegal subjects of bargaining, but a contract provision embodying an illegal subject is, of course, *ultra vires* and unenforceable.

Language is frequently incorporated into state statutes to establish the broad outlines of the scope of bargaining. State courts and public employment relations boards have frequently relied upon the mandatory-permissive-illegal distinction. Some states have attempted to include specific restrictions on the subject matter of bargaining or exclude specific matters from the category of mandatory subjects of bargaining. Another source of restriction on the scope of bargaining is judicial interpretation of statutory language. Some courts have been reluctant to give expansive interpretations to the language governing scope of negotiations.

Determining the scope of bargaining is somewhat difficult where statutory management rights clauses are involved. Some state statutes and courts have declared that the public employer has no obligation to bargain with respect to matters of "public policy" or "inherent managerial prerogative." The public employer's power to bargain collectively, while broad, is not unlimited. Although a public employer is free to negotiate any matter in controversy, whether or not it involves a term or condition of employment subject to mandatory bargaining, it may do so only in the absence of plain and clear prohibition in *statute* or *controlling decisional law*, or *restrictive public policy*. On the other hand, a state statutory requirement that the parties negotiate as "equals" will be insignificant if the statute also narrowly limits the scope of bargaining. To promise the government employee equality at the bargaining table while at the same time excluding most items relating to wages, hours and working conditions from the mandatory subjects of bargaining would make collective bargaining for school employees an illusion. What is public policy? Public policy is independent of statutes and is found described in court decisions. It restricts public employers. Boards of education are but representatives of the public interest and the public interest must, certainly at times, bind these representatives and limit or restrict their power, in turn, to bind the public they represent.

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[29] Lake Michigan Fed. of Teachers v. Lake Michigan College, 231 N.W.2d 538, 60 Mich. App. 747 (19____).

What is managerial prerogative? There is a legitimate area of managerial prerogative which is committed to the board of education and which cannot be bargained away. Decisions concerning the "core of entrepreneurial control" are solely the business of the employer and a special kind of vitality in the public sector, and at the very least, matters which are fundamental to the existence, direction and operation of the school district should be outside the scope of negotiations. The test to determine managerial prerogatives is:

> Negotiable terms and conditions of employment are those matters which intimately and directly affect the work and welfare of public employees and on which negotiated agreement would not significantly interfere with the exercise of inherent management prerogatives pertaining to the determination of governmental policy.

Most courts and state agencies have undertaken a case-by-case analysis to determine bargainable subjects. The Michigan Employment Relations Commission has indicated that a more expansive list of bargainable subjects should be found to exist in the pubic sector, for unlike the private sector, public employees are prohibited from taking recourse to strike activities.

The following cases are examples of state court pronouncements on the obligation of a school board to bargain over matters inherently managerial:

> ***Unified School District No. 1 of Racine v. Wisconsin Employment Relations Commission***
>
> Collective bargaining between school district and employees is required concerning matters which are primarily related or fundamentally, basically or essentially related to wages, hours or conditions of employment but is not required with regard to educational policy and school management and operation or direction of the school system.[30]

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[30] Unified School District No. 1 of Racine v. Wisconsin Emp. Rel. Comm'n, 81 Wis. 2d 89, 259 N.W.2d 724 (1977).

Brookhaven Comsewogue School District v. Port Jefferson Station Teacher's Association

Restrictions against collective bargaining between teachers' associations and school district include plain and clear prohibitions in statute or decisional law and even in public policy independent of decisional law.[31]

Unified School District No. 1 of Racine County v. Wisconsin Employment Relations Commission

Primary relationship test to be used in determining whether issue is appropriate for collective bargaining between school district and employees, should be applied on a case-by-case basis and is not subject to broad and sweeping rules that are to apply in all situations.[32]

The following two cases are examples of specific issues which are reserved to school boards

Board of Education, Great Neck Union Free School District v. Areman

Board of Education cannot bargain away its right to inspect *teacher personnel files*, and a provision in a collective bargaining agreement which might reflect such a bargain is unenforceable as against public policy. Absent access to teacher personnel files, the board's ability to make independent tenure evaluations, as well as its ability to furnish written statements in support thereof would be impaired greatly.[33]

In re West Irondequoit Teachers Association v. Helsby

Class size is basic element of educational policy susceptible to independent action made in the light of the employer's resources and needs of its constituency and bearing on the extent and quality of the service rendered. (Since class size impacts teacher load this impact would be subject to mandatory negotiations.)[34]

While the courts held that school boards are not required to negotiate over matters that are clearly managerial prerogatives, it has been held that they must negotiate the impart of the implementation of educational policy.

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[31] Brookhaven Comsewogue Sch. Dist. v. Port Jefferson Station Teacher's Ass'n, 389 N.Y.S.2d 402 (19____).

[32] Unified School Dist. No. 1 of Racine County v. Wisconsin Emp. Rel. Comm'n, 81 Wis. 2d 89, 259 N.W.2d 724 (1977).

[33] Board of Educ., Great Neck Union Free Sch. Dist. v. Areman, 362 N.E.2d 943 (N.Y. 1977).

[34] *In re* West Irondequoit Teachers Ass'n v. Helsby, 315 N.E.2d 775 (N.Y. 1974).

Educational policy affecting conditions of employment

> School board, as employer of teachers who were members of association which was bargaining agent for teachers, would be required to meet and confer and collectively bargain as to demands of teachers association which primarily related to wages or hours or conditions of employment, *and impact of establishment of educational policy* affecting wages, hours and conditions of employment.
>
> While school board has right to unilaterally establish class size, it nevertheless has duty to bargain class size as it affects hours, conditions or employment and salaries.[35]

The scope of negotiations has been widely discussed in collective bargaining literature. Many unfair labor practice cases arise from questions related to the obligation of the school board to refuse to negotiate certain topics. It is not the purpose of this paper to discuss this topic. For an excellent presentation of scope of negotiations *see* ALR 3d 242.

Employer's Unilateral Changes in Wages, Hours and Other Terms and Conditions of Employment

When a public employer contemplates a change in working conditions it has an obligation to notify the bargaining agent and give the bargaining agent a reasonable opportunity to demand bargaining on that subject.

Employer unilateral change in working conditions which affects wages and hours are generally prohibited practices. Examples are illustrated in the following cases:

Reduction in length of work year

> *City School District of City of Oswego v. Helsky*
>
> A school board unlawfully violated its duty to bargain by unilaterally reducing the length of the work year for some of its employees. Decisions as to the length of the work year are not fundamental governmental decisions within the exclusive control of school boards. Rather, the work year is the function of hours of work and, therefore, is a term of employment about which public employers are required to negotiate.[36]

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[35] Beloit Education Association v. Emp. Rel. Comm'n, 73 Wis. 2d 43, 242 N.W.2d 231 (1976).

[36] City School District of City of Oswego v. Helsky, 346 N.Y.S.2d 27, 42 A.D. 2d, 262.

Increasing length of workday

In re Galloway Township Board of Education and Galloway Township Education Association

A school board unlawfully increased a workday of teachers in a split session school by fifteen minutes while negotiations for a new agreement were in progress. As the board made no attempt to comply with its statutory duty to negotiate the change before putting it into affect, its unilateral action in this regard constituted a *per se* refusal to bargain.[37]

Reducing number of hours of work

Galloway Township Board of Education v. Galloway Township Association of Education Secretaries

PERC had power to order employer to pay secretarial employees, whose hours of work were unilaterally reduced, the monetary difference between the amount of money they were paid and what they would have been paid if their hours had not been unlawfully reduced.[38]

Fiscal uncertainty no excuse for failure to bargain

Pasco County School Board v. Florida PERC

A school board's unilateral adoption of a salary schedule which included a 5 percent cut in salaries, a 5 percent cut in supplements, a freeze on increments and a change in the school calendar eliminating pre-school planning days was an unlawful refusal to bargain. The board was statutorily mandated to bargain in good faith with the union's negotiator, and fiscal uncertainty did not excuse it from this requirement.[39]

Last wage offer cannot be raised and instituted

Lupaw v. Regents of University of California

Although it is an unfair labor practice for an employer to grant wage increases greater than any he has ever offered the union at the bargaining table, for the reason that such action is necessarily inconsistent with a sincere desire to conclude an agreement with the union, it is not necessarily an unfair labor practice for an employer, after notice and consultation, to unilaterally institute a wage increase identical with one which the union has rejected as too low.[40]

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[37] *In re* Galloway Twp. Bd. of Educ. and Galloway Twp. Educ. Ass'n (N.J. Sup. Ct., App. Div., No. A-483-76, Jan. 20, 1978).

[38] Galloway Twp. Bd. of Educ. v. Galloway Twp. Ass'n of Education Secretaries (N.J. Sup. Ct., No. A-132/133, Aug. 1, 1978).

[39] Pasco Cty. Sch. Bd. v. Florida PERC (Fla. Dist. Ct., 1st Dist., No. CC-38, Nov. 16, 1977).

[40] Lupaw v. Regents of Univ. of Calif., 54 Cal. App. 3d 215, 126 Cal. Rptr. 515.

Employee organization must raise timely issue of duty to bargain

City of Norwich v. Norwich Fire Fighters Commission

> An employer's unilateral change in its method of measuring the amount of retirement benefits due to its employees without benefits due to its employees without negotiating about the change was not a refusal to bargain in good faith. The employees' organization was aware of the alteration, but made no attempt to raise the issue during negotiations for approximately two and one-half years after it was instituted.[41]

Duty to Bargain Over Miscellaneous Conditions of Employment

Residency

A "residency rule" is a condition of employment and a mandatory subject of collective bargaining. An employer cannot unilaterally adopt such a rule as a condition or requirement of employment. The adoption of a school board policy concerning residency, if unilateral, is in derogation of the employer's obligation to bargain with representatives of the employees and a prohibited practice.

> In Wisconsin, residency is a mandatory subject of collective bargaining.[42]
>
> Where city and bargaining representative of city police had engaged in good-faith bargaining on issue of residency but the negotiated agreement was rejected by the Detroit Common Council, impasse situation resulted, and the City was entitled to take unilateral action in adopting residency ordinance. In future negotiations, the City would again be required to bargain in good faith on the residency requirement if it was proposed as a bargaining issue by the police.[43]
>
> Residency requirement as condition of employment for hire and promotion of all employees of board of education was invalid, except insofar as it was recruiting requirement; by issuing resolution to that effect without prior bargaining, board rejected its bargaining obligation and violated PERA.[44]

Grievances Administration and Arbitration

The refusal of an employer to abide by the mandatory provision of a contractual arbitration is a prohibited practice. It is for the arbitrator to rule on the question of arbitrability and the employer cannot unilaterally reserve to itself the making of this judgment. In some states, an employer commits an unfair labor practice by refusing to proceed to arbitration on a grievance or to comply with an arbitrator's award.

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[41] City of Norwich v. Norwich Fire Fighters Comm., 377 A.2d 290 (Sup. Ct. 1977).

[42] Conway v. Kenosha, 409 F. Supp. 344 (1975).

[43] Detroit Police Officers Assn. v. City of Detroit, 214 N.W.2d 803, 391 Mich. 44 (19____).

[44] Detroit Fed. of Teachers, Local 231 (AFT) v. Board of Educ. of Detroit, 237 N.W. 238, 65 Mich. App. 182 (1974).

> Grievance arbitration and other disciplinary procedures are "other terms and conditions of employment" within the meaning of the Public Employment Relations Act and fall within the scope of items on which Michigan Public employers and employee associations must bargain to impasse.[45]
>
> If a failure to request sufficient funding is a "grievance," an employer's failure to submit such grievance to binding arbitration is unfair labor practice under PERA. A failure to submit a grievance to binding arbitration is a failure to discuss the grievance for the purpose of the act.[46]
>
> A school district did not have to process the salary grievance of a substitute teacher under contract grievance procedures since the teacher was not a member of the bargaining unit covered by the contract.[47]
>
> A school district's refusal to process a grievance occurring after the expiration of a collective bargaining agreement did not constitute either an interference with the rights of its employees or a refusal to bargain collectively. In the absence of a contract there was no applicable grievance procedure in existence.[48]
>
> School district violated Oregon statute establishing collective bargaining rights for public employees by refusing to comply with arbitrator's decision arising under school district's collective bargaining agreement.[49]

Subcontracting

A decisive question is whether "subcontracting" of work previously performed by members of the bargaining unit is covered by the phrase

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45. Pontiac Policy Officers Assn. v. City of Pontiac, 397 Mich. 674, 246 N.W.2d 831 (1976).

46. Association of Penn. State College and University Faculties v. Commonwealth of Penn., 373 A.2d 976 (Pa. D.&C. 1976).

47. Richland Educ. Assn. v. Penn Labor Rel. Bd. et al, Civil Div., No. 1977-3804, (Pa. C.P., June 12, 1978).

48. Pennsylvania Labor Rel. Bd. v. Williamsport Area Sch. Dist., No. 650, C.D., (Pa. Commw. Ct., March 18, 1977).

49. Corvallis Sch. Dist. v. Education Ass'n, (Or. App., No. C-9-77, CA 10065, Aug. 2, 1975).

"terms and conditions of employment." Subcontracting of work generally contemplates a situation in which an employer enters into a contract with another employer providing that the employees of the second employer shall perform work normally performed by the employees of the first. The case of *Van Buren School District v. Wayne County Circuit Judge*,[50] is a good example.

Prior to the 1972-73 school year, the Van Buren School District had owned, operated and maintained a transportation system for the busing of about 95 percent of its students. It had employed some 58 persons to drive its buses. These bus drivers had been represented for purposes of collective bargaining since 1965. On April 12, 1972, the president of the union local requested in writing the opening of negotiations for a new contract. Several oral requests were made later.

In early July, 1972 the Van Buren District awarded a subcontract to the National School Bus Service, Inc. to operate its school bus transportation system and notified its bus drivers by letter of its decision. Approximately 50 percent of the Van Buren bus drivers were ultimately hired by National. The Union filed an unfair labor practice charge with MERC alleging violations of Section 10 (a) of PERA. The MERC found that the Van Buren District had engaged in an unfair labor practice in failing to bargain with the union about the decision to subcontract the busing of the students. The finding was upheld by the Court of Appeals.

The MERC and Court of Appeals relied upon the U.S. Supreme Court's decision in *Fibreboard Paper Products Corp. v. National Labor Relations Board.*[51] In *Fibreboard*, the Supreme Court held that the decision to subcontract maintenance work concerned "terms and conditions of employment" and was therefore a mandatory subject of collective bargaining. Three factors were stated as being crucial in determining whether an employer's decision to subcontract work that was formerly done by employees is a subject of mandatory bargaining: (1) if the decision to subcontract does not alter the employer's basic operation, (2) if there is no capital investment or recoupment, and (3) if the employer's freedom to manage his business would not be significantly abridged by requiring bargaining. The Michigan Court of Appeals found that facts in the *Van Buren* case were substantially similar to those in *Fibreboard* and thus Van Buren had a duty to bargain about its subcontracting decision. In *Van Buren* the Court held that all three crucial tests were present. First, the employer's basic operation did not change because busing of students remained a basic responsibility of the school district. Second, the District merely replaced existing employees with those of the independent contractor to do the same work under similar conditions and did not recoup any capital investment. Van Buren agreed to sell almost all of its buses to National under an arrangement which allowed Van Buren to reduce its periodic payments to National by a corresponding amount. At the time of the MERC hearing, Van Buren had not recouped anything on its capital investment. Third, the Court held that the Van Buren district remains free, indeed obligated, by state law to manage its transportation system.

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[50] 61 Mich. App. (1972).
[51] 379 U.S. 203 (1964).

MERC had ordered Van Buren to comprehensively remedy the effects of its unfair labor practice by: (1) rescinding its subcontract with National and reinstating such services as they existed prior to such unlawful subcontracting, (2) offering reinstatement and providing back pay to all former employees, and (3) bargaining upon request with the union with regard to subcontracting of bargaining unit work. The MERC decision was sustained by the Court of Appeals.

The remedy imposed was designed to return the parties to the bargaining positions they were in before the unfair labor practices were engaged in, in full recognition of the fact that in order to make the duty to bargain meaningful there must be something to bargain about.

A case involving subcontracting of a food service is shown below.

> A school board committee recommended that the food service program management be contracted out, but that its employees retain job security, wages and seniority. A union demanded that the school board bargain with it concerning the contracting out of food services. However, the school board refused to bargain with it.
>
> The court held that the school board unlawfully refused to bargain with the union concerning the contracting out of a food service program. Since the food service program did not primarily relate to basic educational policy, nor meet private labor tests of negotiability, this was a subject of mandatory bargaining. A school board which was authorized by a statute to manage and operate a food service program was subject to and limited by employee's relations act.[52]

Unilateral employer decision to conduct student evaluation of teachers not negotiable

University did not unilaterally change working conditions when it adopted a program for student evaluation of teaching effectiveness. There was no change in working conditions and scope of bargaining does not extend to matters of educational policy. The university, however, would be required to bargain over the "impact" of such an evaluation program on such items as promotions, tenure and merit pay increments. (This case did not change scope of bargaining in K-12 schools.)[53]

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[52] Unified School Dist. No. 1 of Racine Cty v. WERC, (Wis. Cir. Ct., Dane County, No. 144-464, Oct. 21, 1975).

Issuance of individual teacher contracts

A school board could not be enjoined from requiring individual teachers to sign reemployment contracts for the new school year, as required by state law, notwithstanding the fact that the school board was then engaged in related negotiations with the teachers' union under a teachers' bargaining act imposing a duty on the school board to meet with the teachers' union and negotiate in good faith.[54]

Abolishing positions must be negotiated

The effect of a school committee's decision to abolish 12 positions should have been negotiated with union representing the involved teachers. This was necessary, ruled the Supreme Court, because the committee's decision adversely affected the individual teachers and therefore could not be solely an educational policy decision. Bargaining on this issue would not "significantly abridge" the committee's freedom to manage and control the school system.[55]

Unilateral decision to replace paid employees with volunteers prohibited

School employer's unilateral replacement of paid teacher aids with volunteers was a wrongful refusal to bargain. The decision had a direct impact on the aides' conditions of employment, far outweighing any consideration of managerial policy.[56]

Violation of bargaining agreement

Where a dispute arises from the bargaining agreement between the parties and from these relationships under the contract, it is the practice of state employment relations agencies to defer to the use of contract procedures agreed upon between the parties for resolution of the dispute. It is the usual practice of state agency, that when a contract issue is combined with a violation of the collective bargaining statute, the state agency will withhold its agency.

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[53] Central Michigan University Faculty Association v. Central Michigan University, 75 Mich. App. 101, 254 N.W.2d 802 (1977), *leave to appeal granted*, 401 Mich. 831.

[54] Edgeley Education Association v. Edgeley Public School Dist., 231 N.W.2d 826 (N.D. 19____).

[55] Barrington School Committee v. Rhode Island State Labor Relations Board, PBC CCH (1978).

[56] Pennsylvania Labor Relations Board v. Mors Area School Dist., (Penn. Sup. Ct., Western Dist., No. 49, July 18, 1978).

The usual practice utilized in resolving contract disputes is through arbitration and state employment agencies have adopted a policy to defer these matters to arbitration or whatever contract procedures the parties have agreed upon to resolve the dispute. However, violation of an existing collective bargaining agreement has been held to be a prohibited practice.

> A University employer that unilaterally initiated a seniority system at three levels for teaching assistants violated a bargaining agreement seniority provision that called for two levels. Instituting the new system was a refusal to bargain that also violates a structure agreement under which the employer had agreed to first negotiate such changes.[57]

Negotiating with minority union

An employer violates its bargaining duty by negotiating directly with its employees or with a minority union. An employer's statutory obligation is to deal with its employees through the exclusive bargaining agent.

> An employer violates its duty to bargain if it permits an individual employee to argue before it on behalf of an *ad hoc* group of unit employees concerning a matter subject to collective bargaining.
>
> School board committee prohibited labor practice where it allowed representatives of minority group to speak at regular public meeting of board, listened to his statements, and received results of petition circulated by that group, all concerning matters subject to collective bargaining. Speaker's expression exceeded mere taking of position and constituted active participation in negotiation process.[58] Note: (This case was reversed by the U.S. Supreme Court).

Employer's authority to take legal unilateral action following impasse

A unilateral change in working conditions is unlawful if instituted prior to the time a *bona fide* impasse is reached. Absent an impasse, an employer cannot grant an increase in benefits or wages to bargaining unit employees during contractual negotiations. It is elementary, however, that an employer may unilaterally alter existing wages or other items or conditions of employment in situations where after having bargained with a collective bargaining agent, in good faith, an impasse has been reached. (A party cannot isolate one issue and upon receiving a readily foreseeable response from its bargaining opponents create an instant impasse.)

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[57] State *ex rel.* Teaching Assistants Association, Wisconsin Federation of Teachers, AFL-CIO v. University of Wisconsin, (Wis. Cir. Ct., Dane County, No. 159-180, April 14, 1978).

[58] Madison Joint School District v. Wisconsin Emp. Relations Commission, 69 Wis. 2d 200, 231 N.W.2d 206, *Reversed* 97 S. Ct. 421 (1976).

Following negotiations to a point of impasse on a mandatory subject, the employer can take unilateral action, so long as it does not exceed the term of his *final* offer to the union. However, the duration of the duty to bargain in the public sector may extend beyond impasse because most states prescribe some sort of impasse resolution mechanism, including mediation and fact finding which may be invoked after impasse.

Both the union and the public employer are required to participate in the impasse settlement. Impasse procedures thus clearly contemplate further negotiations by the parties even where both sides have declared an impasse. As a result a public employer may not be able to take unilateral action with regard to a mandatory subject, if at all, until after all impasse procedures have been exhausted. It has generally been held that an employer may take unilateral action at any time with respect to permissive subjects.

Information required for bargaining

A board of education was found to have committed an unfair labor practice (refusal to bargain) by refusing to honor a teachers' bargaining agent's request for the names and placement of each teacher in the bargaining unit on the existing salary schedule. The school board contended that it could not reveal this information without the teachers' consent. The Commission held that the union was entitled to the information to aid in formulating, and to determine the cost of, an economic package.[59]

A school board was required to provide the bargaining agent with annual statistical reports and monthly budget reports and to permit an examination of all current individual teacher contracts and those for the forthcoming year. The information was deemed to be relevant, not confidential, privileged, or unreasonable, and not readily available to the agent from other sources.[60] However, a public employer is not obligated to give names and salaries of employees who are not in the bargaining unit to a representative of the bargaining agent.[61] An employer cannot require that the submission of relevant data needed by the labor organization be made a subject of collective bargaining.[62]

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[59] Carrollton Public Schools, 1968 MERC Lab. Op. 839 and Traverse City Public Schools, 1969 MERC Lab. Op. 395.

[60] Edwardsburg Public Schools, 1968 MERC Lab. Op. 927.

A public employer was entitled to withhold from the bargaining agent new instructors' completed application forms because they embodied some items of a highly personal nature, but was required to produce material from the application blanks used to determine each instructor's place on the salary schedule as well as a "point allocation chart" used, following a formula included in the master agreement, for determining salary.[63] When information is accessible to the public, a public employer is not required to furnish it. For example, a public employer did not violate his duty to bargain by not providing the bargaining agent with information available for public inspection in the college library.[64]

Bargaining directly with employees

If a question of representation is pending and no bargaining agent has been determined, a public employer has no obligation to bargain with its employees and may unilaterally grant wage increases[65] and change the employee's insurance program.[66] However, during collective bargaining negotiations with a legal bargaining agent an employer violates its bargaining duty by communicating directly to its employees an economic offer,[67] or changes in working conditions.[68] An employer's statutory obligation is to deal with its employees through the exclusive bargaining agent; not to deal with the agent through the employees.[69]

Communicating directly with employees

No unfair labor practices were committed where a school board president sent a letter to all teachers which outlined the school board offer to the teachers' union. The letter did not contain any language that would lead a reasonable person to believe that the Board was attempting to make an agreement with the teachers by reporting factually in notices to employees the status of negotiations between the representatives of the employees and the employer does not violate 10 (a) or 10 (e).[70]

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[61] Traverse City Public Schools, 1969 MERC Lab. Op. 395.

[62] Washtenaw Community College, 1968 MERC Lab. Op. 956 and Saginaw Twp. Board of Education, 1970 MERC Lab. Op. 127.

[63] Washtenaw Community College, 1968 MERC Lab. Op. 956.

[64] *Id.*

[65] Grand Rapids School Board, 1967 MERC Lab. Op. 355.

[66] Grand Rapids School Board, 1966 MERC Lab. Op. 282.

[67] Morenci Area Schools, 1969 MERC Lab. Op. 24. The School Board's last offer was mailed directly to the teachers.

[68] W. K. Kellogg Community College, 1969 MERC Lab. Op. 407.

[69] Bullock Creek School District, 1969 MERC Lab. Op. 497.

No unfair labor practice was committed when the school board's negotiator addressed the teachers, telling them that the school district would operate under the 71-72 contract until agreement was reached for a new contract and passed out the Board's final offer to all teachers in written, mimeographed form.[71]

Lockout

A lockout by a public employer is unlawful because the explicit purpose of the Act is to prevent work stoppage.[72] The Commission held that a lockout, an offensive bargaining weapon by a public employer, falls in the same category as a strike by employees.[73] The Commission found a school board was in violation of PERA when it locked out employees during contract negotiations by delaying the start of the school year by one week. The Commission required the school board to pay the employees who could not work during the one-week lockout, with interest at the rate of six percent.[74]

Public meetings

A bargaining agent, relying upon the statute below insisted that bargaining sessions should be open to the public:

> Meetings of the board shall be public meetings and no person shall be excluded therefrom. The board may hold executive sessions, but no final action shall be taken in any executive session .... All business which the board of any district is authorized to perform shall be valid unless voted at a meeting of the board by a majority vote of the members elected to the board and a proper record made of the vote.[75]

In interpreting the above statute as it related to collective bargaining the Commission stated:

> We believe the legislature intended neither preliminary discussion *in public* of the purchase price of desks or books, nor the services of teachers—so long as the public has an opportunity to know the terms of the bargain before final school board approval or disapproval. We will not impose upon the parties the obligation to bargain in a public arena if they are unwilling to

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[70] Grand Haven Board of Education, 1973 MERC Lab. Op. 1.
[71] Chelsea Board of Education, 1973 PERC Lab. Op. 271.
[72] W. K. Kellogg Community College, 1969 MERC Lab. Op. 407.
[73] Genesee Intermediate School District (unpublished) 1970.
[74] *Id.*
[75] MCLA 340.561.

> do so. Such an obligation would tend to prolong negotiations and damage the procedure or compromise inherent in collective bargaining.[76]

A public employer is not required by PERA to provide a meeting place for negotiations.[77]

Since a board of education can act only informal session, approval of a salary schedule, individually solicited by the superintendent by telephone, was not binding on the board.[78] The fact that members of the board were on the bargaining team and agree to a proposal does not mean that the full board has lost its right to act.[79]

Parties authority to delegate bargaining

Public employers and unions can select whomever they choose to represent them in formal labor negotiations and neither can control the other's selection of a bargaining representative. MERC stated:

> It is not required that Municipal Councils, Commissions and boards bargain directly with the representatives of their employees. This may be done by administrative employees or other agents who are clothed with authority to participate in effective collective bargaining but reserving final approval to the governing body. Such is common practice in the private sector, and it is effective and workable.[80]

When it is clear that both parties understand that a tentative agreement is subject to ratification by the appropriate body, it is not an unfair labor practice which constitutes bad faith bargaining for either party, to reject the draft proposal negotiated on its behalf by the bargaining committee.[81] However, an unfair labor practice committed by an employer's representative will be imputed to the employer.

Ratification of contracts

In the absence of a contract provision to the contrary, ratification of a contract is a matter which is exclusively within the internal regulations of the Union. PERA imposes no obligation upon the bargaining agent to obtain employee ratification of the contract negotiated on behalf of the bargaining unit. Members of a union have the right to determine the extent of authority delegated to their bargaining representatives. It is within their authority to determine whether or not the bargaining agent may enter a binding contract with or without membership ratification.[82]

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[76] Menominee Board of Education, 1968 MERC Lab. Op. 383.

[77] *Id.*

[78] North Dearborn Heights School District, 1967 MERC Lab. Op. 673.

[79] Eau Clare Public Schools, 1973 MERC Lab. Op. 184.

[80] Detroit Board of Fire Commissioners, 1970 MERC Lab. Op. 953.

[81] North Dearborn Heights School District, 1967 MERC Lab. Op. 673.

Bargaining over fact finder's report

A fact finding report should be given serious consideration and should be bargained about in good faith.[83]

Where a party in good faith attempts to resolve its differences with its bargaining adversary, although not accepting the fact finder's recommendations, there is no bargaining in bad faith. The only requirement is that there is a reasonable effort by each party to reconcile any differences.[84]

Representation election and obligations to continue contract

The outcome of a representation election does not have any effect upon the contracutal obligations existing pursuant to a valid collective bargaining agreement. The terms of the agreement will continue to the expiration of the contract.[85]

PROHIBITED PRACTICES: UNLAWFUL STRIKES

Strikes by school district employees are not protected lawful concerted activity in most states for the purpose of collective bargaining or other mutual aid or protection. Some states specifically list strike activity as a prohibited practice.[86]

The Michigan Public Employment Relations Act prohibits strikes by public employees and empowers the officer or body generally having disciplinary authority over an employee to terminate the employment of or impose other disciplinary action on an employee who strikes in violation of the statute.[87]

However, if it should be determined that the employer engaged in an unfair labor practice, the Michigan Employment Relations Commission (MERC) may, despite the illegality of the public employee strike, order reinstatement.

To determine whether employee misconduct will bar reinstatement, the NLRB and the U.S. Court of Appeals have considered the gravity of the employee's misconduct in light of the employer's unfair labor practices and discriminatory discharges. Since MERC has stated that it will be guided by NLRB and Federal court rulings, MERC will consider both the seriousness of the employer's unlawful acts as well as the seriousness of any employee misconduct in determining whether reinstatement would effectuate the policies of the Act. Those policies inevitably come into conflict when *both* labor and management are at fault.

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[82] Village of Chesaning, 1974 MERC Lab. Op. 580 and Ted's Gaslight Room, 1973 MERC Lab. Op. 888.

[83] City of Dearborn, 1972 MERC Lab. Op. 749.

[84] Detroit Board of Education, 1973 MERC Lab. Op. 131 and Monroe County Road Commission, 1974 MERC Lab. Op. 43.

[85] Ionia County Road Commission, 1969 MERC Lab. Op. 2 and Garden City Public Schools, 1974 MERC Lab. Op. 364.

[86] Kan. Stat. Ann. § 72-5414(5).

[87] Mich. Comp. Laws Ann. § 423.202; Mich Stat. Ann. § *17.455(2)*.

The principle that public employee strikers are automatically denied reinstatement because they have not come into court with "clean hands" is not applicable to a proceeding in which a governmental agency is seeking enforcement of its order in the public interest. If the MERC finds that an unfair labor practice or other misconduct was committed by both sides, it should balance the competing equities. Two factors must be considered before holding that employee misconduct automatically precludes automatic reinstatement. First, the employer's unfair labor practices may have been so offensive that they provoked employees to resort to unprotected action. Second, reinstatement may be the only remedy which prevents an employer from benefiting from his unfair labor practices through discharge which may weaken or destroy a union.

> Public school teachers engaged in an illegal strike could properly be discharged by the school board prior to the hiring of replacements, but if the state public employment relations board should find that the strike was directly provoked and instigated by unfair labor practices on the part of the school board, then the teachers would be entitled to reinstatement should the board find that such affirmative action would best effectuate policies of the public employment relations act.[88]

Judicial decision permit employer latitude in discipline for unprotected activities. Specifically, it has been held, an employer may pick and choose in discharging or refusing to rehire employees who have engaged in unprotected activities.

> A public employee, in resigning during term of his/her contract as part of strike action, is engaging in unprotected activity; and the employer does not commit an unfair labor practice in failing to reinstate him/her to his/her position, although it takes back a number of employees who also had joined in the strike.[89]

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[88] Rockwell v. Board of Education, 393 Mich. 616, 227 N.W.2d 736.

[89] Pennsylvania Labor Relations Board v. Pleasant Valley School District, 66 D.&C. 2d 637 (1978).

An unfair labor practice does not legalize a public employee strike.

A school board has a duty to continue collective bargaining during an unlawful public employee strike.

PROHIBITED PRACTICES: UNION DUTIES

Most, but not all, states enumerate unfair labor practices by unions as well as employers. State statutes may make it unlawful for a union to restrain or coerce employees in the exercise of protected rights, to discriminate or to coerce employers to discriminate against employees, or to refuse to bargain in good faith. It also may be an unfair labor practice for unions to coerce employers in the selection of their representatives for the purpose of collective bargaining or adjustment of grievances.

A union generally owes a duty to represent fairly all unit employees without regard to whether or not they are union members. A violation of this duty may be an unfair labor practice. In some states a strike, work stoppage or slowdown may be a prohibited practice and subject to remedy. Unions, as well as employees, may commit an unfair labor practice by refusing to comply with an arbitration award or by breaching a collective bargaining agreement.

Duty of Fair Representation

Duty of fair representation is a necessary corollary to the doctrine of exclusive representation. A union that violates the duty of fair representation commits an unfair labor practice in that it unlawfully restrains or coerces employees in the exercise of protected rights.

The duty of fair representation is of a fiduciary nature. The duty embodies affirmative responsibility with regard to the allocation of benefits the union has secured for the employees in a collective bargaining agreement. It is more than the absence of bad faith or hostile motivation. The affirmative obligation is not merely confined to cases that involve the handling of grievances or the disparate treatment of subgroups on the basis of sex or race. Violation of the duty can consist of the lack of fairness in the union's decision-making process. For example, MERC held that a union breached its duty of fair representation to its part-time members, thereby violating Section 210 of PERA, when it provided that on issues of contract ratification and election of a bargaining team the total vote of the part-time employees could not exceed 20 percent of the regular membership vote. This operated to disenfranchise the part-time members (*In re* Wayne County Community College (MERC 1976) Case No. CU 74 J-29).

Although the union has the sole right to negotiate and consummate a contract and process grievances for all employees in the unit, the right to do so must always be exercised with complete good faith, honesty of purpose, and without unfair discrimination against a dissident employee or group of employees. This is true not only in the negotiation of the agreement but in its administration as well. Fair representation exists at the negotiating table, in the administration of the agreement, and in the processing of grievances.

Union Unfair Labor Practice Cases

> A union did not breach its duty of fair representation to employees when it failed to inform them concerning the status of negotiations even though negotiations culminated in lower salaries and expanded work hours. The mere fact that a negotiated agreement resulted in detriment to one group of employees did not establish a breach of duty absent evidence of arbitrary, discriminatory or bad faith conduct.[90]
>
> Considerations of union democracy and fairness do not require that a union submit a bargaining agreement to all unit employees for approval but only to union members.[91]
>
> Under PERA, a strike does not necessarily indicate a failure to bargain in good faith.[92]
>
> Teacher strike was not an "unfair labor practice" within this section giving MERC exclusive jurisdiction over all unfair labor practices.[93]

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[90] Beleu v. Woodbridge Twp. Board of Education, 2 PBC 20,331, CCH (N J. Super. Ct., 1976).

[91] *In re* Wald (Nassau Chapter, Civil Service Employees Association Inc.) 2 PBC 20,106, CCH (N.Y. Sup. Ct., 1973).

[92] Lamphere School District v. Lamphere Federation of Teachers, 241 N.W.2d 257, 67 Mich. App. 485 (19____).

[93] Board of Education for School District of Detroit v. Detroit Federation of Teachers (DFT) Local 231 AFT, 223 N.W.2d 23, 55 Mich. App. 499 (19____).

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Legal Aspects of Teacher Evaluation

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In an age of accountability—characterized by declining enrollments, tightening budgets, falling test scores, and increasing legal restrictions—teacher evaluation has become a "hot topic." At this point, the topic has generated more heat than light. Despite (or perhaps because of) opposing educational philosophies and conflicting research results underlying teacher evaluation, there has been relatively limited legislation and surprisingly little litigation directly on point.

Although there are federal overlays and local interplay, the law of teacher evaluation remain largely a matter of state control. Thus, the core section of this paper is a tabular analysis of state statutes and administrative regulations concerning teacher evaluation. This core section is preceded by an overview of the federal overlay, and is followed by a summary of the case law relating to teacher evaluation.

OVERLAY OF FEDERAL LAW

As in other areas of the law, constitutional considerations provide parameters for the substantive and procedural aspects of teacher evaluation. The First Amendment's freedom of expression clause protects, within limits, the conduct and appearance of teachers. For example, California's highest court found that a probationary English teacher's reading of a composition which concluded with a vulgarity was constitutionally protected conduct where the purpose of the act

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Editors Note:

For readers who are interested in a more detailed treatment, NOLPE is planning to publish a monograph on this subject by Dean Zirkel and Chris Castens.

The author acknowledges with appreciation the assistance of Prof. William D. Valente of Villanova University School of Law in polishing and presenting this paper at the NOLPE convention in December 1978.

was clearly educational and the welfare of the school or pupils was not adversely affected.[1]

Similarly, the Fourteenth Amendment's equal protection clause protects racial-minority teachers from discrimination in the evaluation process. Thus, it has been held that school districts must use non-racial criteria in judging the performance of teachers.[2]

Federal statutes implementing the Fourteenth and other post-Civil War amendments provide more specific limitations on the teacher evaluation process. The various titles of the Civil Rights Act prohibit discrimination based on national origin, race, religion, and sex. Section 504 of the Rehabilitation Act of 1973 and the Age Discrimination in Employment Amendments of 1978 add similar prohibitions based on handicap and age. The effect of these pieces of legislation and of the administrative agencies and regulations adopted to implement them has been pervasive although not yet crystallized. For example, the regulations for Title VII of the Civil Rights Act, known also as the Equal Employment Opportunities Act, define in sophisticated psychometric terms the job relatedness requirements of screening and evaluation instruments for use with minority candidates. In so doing, the regulations not only directly protect the enumerated special subgroups; they also indirectly affect all employees by educating judges to the school lore involved in school law. The same judge who sits one week in a Title VII case may sit the next week in a teacher evaluation case based on other grounds where a concept like criterion validity may be at issue.

OVERVIEW OF STATE LAW

Specific requirements for the evaluation of public school teachers are found at the state level. State laws concerning teacher evaluation cannot be examined and discussed in isolation. Sometimes they do not even appear as separate statutes. Three other categories of state legislation and regulations provide an interlocking framework: teacher tenure, collective bargaining, and teacher certification laws. Teacher tenure laws typically specify incompetence as one of the possible grounds for termination. The means of determining incompetence is specified, if at all, in a subsidiary or separate teacher evaluation law. California's Stull Act, for example, has been classified as both a tenure law and an evaluation law.

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[1] Lindros v. Governing Board of Torrance Unified District, 510 P.2d 361 (Cal. 1973).

[2] Teel v. Pitt County Board of Education, 272 F. Supp. 703 (D.N.C. 1967); Sparks v. Griffen, 460 F.2d 433 (5th Cir. 1972).

Similarly, collective bargaining and teacher evaluation laws within a state interface to introduce a significant degree of local interplay. More specifically, state collective bargaining legislation, regulations, and litigation will determine in which category of the scope of negotiations teacher evaluation fits—is it a mandatory, permissive, or illegal topic? The answer will determine to a large extent whether specific procedures for teacher evaluation will be locally established beyond the minimum federal and state standards. What the answer is and where it is decided will vary from state to state. For example, Connecticut's answer seems to be that teacher evaluation is a permissive topic for local teacher-board negotiations. That answer is found at the legislative level in the interpretation by the appropriate administrative agency. For, as the Connecticut Commissioner of Education pointed out in a memo to all superintendents, the legislation specifically allows for "other guidelines as may be established by mutual agreement between the . . . board . . . and the teachers' representative." In contrast, Nevada's answer is that teacher evaluation is non-negotiable. The laundry-list categorization of topics in Nevada's amended collective bargaining statute was based on a decision by Nevada's highest court.[3] An Illinois appeal court reached a similar result, holding that a local board could not by collective negotiations establish teacher evaluation procedures for nontenured teachers in the absence of or beyond statutory authorization.[4]

Finally, teacher evaluation law (as an exit point) interrelates with teacher certification law (as an entry point). More stringent standards of competency or revised procedures for determining it at the certification stage affect, indirectly at least, such standards and procedures at the evaluation stage. Proposals in some states for performance-based standards and procedures for recertification more intimately interrelate with the corresponding means of teacher evaluation.

Fewer than half (n = 23) of the states have statutes or administrative regulations directly dealing with the evaluation of public school teachers. Their provisions vary widely in terms of both scope and specificity, as is readily seen in the accompanying table which categorizes and summarizes them. The tabular categories relate to *where* evaluation procedures are primarily formulated, *who* is primarily responsible for conducting evaluation, *whom* is evaluated, *when* the evaluations are to take place, *what* is the scope of evaluation, and *how* evaluation is to be conducted.

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[3] Clark County School District v. Local Government Employee-Management Relations Board, 530 P.2d 114 (Nev. 1974).

[4] Wesclin Education Association v. Board of Education, 531 N.E.2d 335 (Ill. App. 1973).

TABULAR OVERVIEW OF STATE STATUTES AND REGULATIONS FOR TEACHER EVALUATION

	WHERE		WHO				WHOM			WHEN				WHAT		HOW			
STATE	State Level	Local Level	Board of Education Discretion	Superintendent or Designee	Principal or Supervisor	Other	Teachers Plus	Teachers Only	Nontenured Teachers	Continually	Yearly	Differential	Other	Global	Categorical	Instrument	Recommendation	Copy	Other
Alaska		x	x				x				x				x			x	
Arizona		x	x					x				x		x			x	x	
California		x	x				x					x			x			x	x
Connecticut	x			x			x			x									
Florida		x			x		x				x							x	
Hawaii	x				x		x					x			x	x	x	x	
Idaho		x	x				x						x						x
Iowa		x																	
Kansas		x	x				x					x			x			x	
Louisiana	x		x				x					x		x			x	x	
Massachusetts		x				x			x				x					x	
Michigan		x	x						x		x		x	x				x	
Nevada		x	x				x					x					x	x	
New Jersey		x	x						x				x	x			x		
New Mexico		x			x		x											x	x
Oklahoma		x	x				x					x				x		x	
Oregon	x		x					x			x				x	x		x	
Pennsylvania	x			x			x					x			x	x		x	x
South Dakota		x	x				x					x			x				x
Tennessee		x					x					x							
Washington		x	x				x				x				x		x		
West Virginia	x		x				x			x									
Wyoming		x			x			x		x									
(23)	(6)	(17)	(14)	(2)	(4)	(1)	(16)	(3)	(3)	(3)	(5)	(10)	(4)	(4)	(8)	(4)	(6)	(14)	(5)

"Where" refers to the primary locus for establishing the policies and procedures for teacher evaluation. In the great majority (n = 17) of the states with teacher evaluation laws, this matter is left largely to the local level. However, an understanding which is explicitly made in some state statutes (*e.g.*, Alaska, Arizona, and California) and which is generally otherwise inherent in our legal system is that these local procedures must meet the minimum statutory standards. In most cases of a local locus, the determination is left to the board of education. However, in about a third of these states the input of local teachers is provided for in the form of either advice (Arizona, California), consultation (Nevada, Oklahoma), or negotiation (Connecticut).

"Who" refers to the role group empowered to conduct or delegate the evaluation. In the majority (n = 14) of the states which address this issue, the answer is left to the discretion of the local school board. In a small minority (n = 2) of states, the matter is left specifically to the superintendent's discretion. In either case, the discretion is presumably bound by the regulations concerning the certification of the person designated as the evaluator. This presumption is made explicit in Pennsylvania, which entrusts the matter to the superintendent or a designee having supervisory responsibility for the evaluatee's work. In a few states, the matter is specifically left to the evaluatee's principal or immediate supervisor. It is explicitly specified in two of these four states and otherwise generally understood that exercise of this power requires the concurrence of the local board or superintendent. One state, Massachusetts, has a unique arrangement for this category; it specifies that the evaluation is to be conducted by a tripartite committee, consisting of one member chosen by the school board, one by the evaluatee, and the third person chosen by the other two members.

"Whom" refers to the role group(s) to be evaluated. In the predominant grouping (n = 16) of the states, not only teachers but other certificated personnel are evaluated. In most such cases, the class is generic—*e.g.*, "professional" or "certificated" personnel. West Virginia uses a more all-encompassing phrase—"every employee." Some "teachers plus" states (*e.g.*, Florida, Louisiana, and Nevada) specifically enumerate categories of personnel—*e.g.*, teachers, librarians, and counselors. Connecticut makes explicit a general understanding, that the superintendent is excepted from the specified (but not necessarily other) procedures for evaluation. In contrast, a few states designate only teachers—or more specifically in the case of Arizona, only certificated teachers—as evaluatees. Finally, a similarly small number of states reserve evaluation only for nontenured (also called "probationary" or "provisional") teachers.

"When" refers to the definition, if any, of the frequency of evaluations. A few states answer this question with a weasel word: "continuously" in Connecticut, "on a regular basis" in West Virginia, and "periodically" in Wyoming. What such continual evaluation means is left immediately to professional discretion and ultimately to judicial determination. In some (n = 5) of the states, evaluation is mandated to be on a yearly basis. However, in the majority (n = 10) of the states which define frequency of evaluation, a differential formula is provided based on tenure status or length of service. Where the differential is based on tenure status, the pattern is either once (California, Louisiana, and Tennessee) or twice (Arizona, Oklahoma, Pennsylvania, and South Dakota) per year for nontenured teachers and varies from once every year (Pennsylvania), every two years (Arizona, California, Louisiana), or every three years (Oklahoma, South Dakota, Tennessee) for tenured teachers. The combinations vary even further where length of service is divided into three categories rather than the two tenure categories (four times during the first year, two times during the second year, and yearly thereafter in Hawaii; two times during the first two years, yearly during the second two years, and one time every three years thereafter in Kansas). Other statutory solutions are provided in Massachusetts (end of probationary period) and New Jersey (three times per year) based on their statutes' application to nontenured teachers only. Idaho requires an evaluation during the third year of experience in one school district.

"What" refers to the degree of specificity of the scope of evaluation. In some (n = 4) of the states, the statutory standard is global—*e.g.*, "competence" (Arizona, Louisiana, and New Jersey), but in the majority (n = 8) of states categorical standards are used—*e.g.*, "personality," "preparation," "technique," and "pupil reaction" in Pennsylvania. Student progress is specifically enumerated as one of the categories in California and at least partially expressed in Kansas' and New Jersey's statutes.

"How" refers to other procedural parameters. Representing the categorical approach to the scope standard, instruments for evaluation have been developed in four states. Pennsylvania's rating form, for example, provides from four to six descriptors for each of the four aforementioned categories. Based on these descriptors as general guides, the evaluator globally rates each of the four categories. A rating of "unsatisfactory" must be substantiated by anecdotal records.

Oregon's instrument, on the one hand, represents a more open-ended and simplistic approach, requiring brief narrative responses to items reflecting a management by objectives (MBO) approach.

Hawaii's instrument, on the other hand, provides for specific definitions and separate ratings for each of its categorical descriptors or criteria. Oklahoma provides a package of alternative approaches: a checklist instrument, an MBO record, and a narrative option.

A group (n = 5) of states require recommendations for improvement by the evaluator, typically to be delivered in a conference with the evaluatee. California, New Mexico, and Tennessee require evaluation conferences but do not specify an affirmative duty for supervisory recommendations. A much larger group (n = 14) of states specify some type of requirement concerning a copy of the evaluation—that it be given to, signed by, or kept in the records of the evaluatee. This requirement is not without teeth in some statutes. In Michigan, for example, failure to give a copy of the evaluation statement to a nontenured teacher within 60 days of the close of the school year automatically results in contract renewal for the subsequent year.

Other procedural provisions include three states' aforementioned bare conference requirement, West Virginia's general mandate that evaluation be "open and honest" and with "due process," and Pennsylvania's prerequisite of two consecutive unsatisfactory ratings for dismissal. New Mexico has a similar procedural protection, requiring at least two evaluation conferences prior to dismissal proceedings, with sufficient intervening time to allow for observation and remediation of deficiences.

SUMMARY OF CASE LAW

The case law concerning teacher evaluation is difficult to summarize not only because of the abovementioned variety of statutory provisions, but also because of the relative paucity of reported decisions. The scarcity of reported decision is in part due to the recency of the teacher evaluation statutes and regulations and in part to the reluctance of administrators to use "incompetency" as grounds for demotion or discharge. For example, in Pennsylvania, which has probably the most lengthy and well-developed legal history concerning teacher evaluation, only about 100 teachers have been charged with incompetency by local boards since 1940, averaging 2.7 per year, and the charges have been upheld against only slightly above 50 percent of the teachers.

Notwithstanding jurisdictional variety and historical paucity, certain guiding generalizations do emerge from the litigation to date. First and perhaps foremost, courts tend to be strict about compliance with the procedures mandated in the legislation and regulations concerning teacher evaluation. For example, dismissal charges against teachers in Pennsylvania based on incompetency were not sustained in cases where the rating system was not strictly followed,[5] where the evaluation form did not contain unsatisfactory ratings,[6] and where the required anecdotal records were not provided.[7]

Procedural defects can work both ways. Failure of the Pennsylvania Department of Education to publish its rating form pursuant to the Commonwealth Documents Law (until just recently) precluded it from enforcing its accompanying regulation that a teacher must be rated unsatisfactory on two consecutive evaluations before being dismissed on grounds of incompetency.[8] At least the courts are consistent in requiring strict statutory compliance by all parties.

Two decisions by the New Jersey Commissioner of Education reveal some flexibility in applying procedural requirements. In *Foleno v. Board of Education,*[9] a nontenured teacher's claim of entitlement to contract renewal was rejected despite the local board's failure to conduct the required three evaluations. However, the board was ordered to give the teacher 60 days' pay. In another such case, the Commissioner ruled that the board's failure to give a teacher a separate written total performance evaluation wasn't sufficient reason to render its dismissal decision fatally defective. (*Shaw v. Board of Education)*[10] However, these rulings lack the precedential effect of higher court decisions and do not reach the stronger claims of tenured teachers. Decisions in other jurisdictions support the view that courts tend to be strict about adherence to teacher evaluation cases.[11]

Local districts must establish specific and systematic procedures for evaluation in areas left to their discretion. The absence of clear standards and procedures for determining competence led to the reinstatement with backpay of a terminated teacher in *Beebee v. Haslett Public Schools.*[12]

School administrators can ill afford to neglect their procedural duties as evaluators under teacher evaluation statutes, as they may ultimately suffer as evaluatees under the same statutes. One case upheld the dismissal of a principal based on his failure to complete the evaluation of all the teachers under his supervision and neglect of his supervisory duties in other ways.[13]

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[5] *In appeal* of Sullivan County Joint Board, 189 A.2d 249 (Pa. 1963).

[6] *Appeal* of Cable, 61 D & C 298 (Pa. Commw. 1948).

[7] New Castle Area School District v. Bair, No. 493 C.D. 1976 (Pa. Commw., May 2, 1977). This unreported decision is available in *School Law Information Exchange* (SLIE), published by the Pennsylvania School Boards Association, vol. 14, no. 35.

[8] Board of School Directors of the Centennial School District v. Pennsylvania Secretary of Education, No. 1319 C.D. 1976 (Pa. Commw., May 19, 1978); Rosso v. Board of School Directors, No. 1546 C.D. 1976 (Pa. Commw., May 24, 1978). SLIE, vol. 15, no. 19 & 42.

[9] Dec. of N.J. Comm'r of Educ. (1978).

[10] Dec. of N.J. Comm'r of Educ. (1978).

[11] Wojt v. Chimacum School District No. 49, 516 P.2d 1099 (Wash. 1973); Van Horn v. Highline School District No. 401, 562 P.2d 641 (Wash. App. 1977).

[12] 235 N.W.2d 724 (Mich. 1976).

A converse conclusion emerges where courts review the substantive aspects of teacher evaluation. There courts tend to be deferential to school authorities. This deferential attitude is put in perspective by looking at cases dealing with the issue of whether pupil progress indicators can be validly used as a basis for an unsatisfactory evaluation leading to dismissal. An examination of their factual contexts warns against overrelying on or generalizing about pupil achievement as grounds for termination. In a case which has been on the books for over 40 years, a teacher's dismissal based *inter alia* upon pupil test scores was reversed, but the court's discussion about the unreliability of such a measure was merely peripheral dictum as several other vague charges of incompetence and negligence were determinative in reaching the reversal.[14]

In *Karstetter v. Evans*,[15] the use of pupil test scores as evidence for a teacher's dismissal was upheld but once again the issue was primarily procedural, and the evidence was largely peripheral. The court ruled that where a teacher had received notice, prior to a hearing, that one ground for nonrenewal was "evaluation of her work compared with other teachers," her procedural due process rights were not violated by introducing evidence of the low achievement of her pupils.

Similarly, a Connecticut lower court upheld the dismissal of a tenured teacher, finding that in light of other evidences of incompetency the use of standardized student achievement test scores was at most harmless error.[16] In a case dealing with student grades rather than test scores, the federal district court in Nebraska stretched, if not twisted, its tongue in upholding the termination of a tenured English teacher with words like: "[He] teaches well the better students but not well with the average and below average."[17] Apparently counting "D's" along with "F's" as failing grades, the court bent over backward to sustain the board's discretion, stating:

> When, as here, for three successive six-week periods more failing grades are given than any other grade, a board reasonably may conclude that not only the student but also the teacher has

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[13] Schneider v. McLaughlin Independent School District No. 21, 241 N.W.2d 574 (S.D. 1976).

[14] Gulich Township School District v. Korman, 31 D. & C. 197 (Pa. C.P. 1937).

[15] 350 F. Supp. 209 (D. Tex. 1971).

[16] Fain v. Board of Education, No. 142532 (Conn. Super., Oct. 29, 1978).

[17] Klein v. Boehmer, No. CV75-L-70 (D. Neb., March 20, 1976).

> failed . . . . A school board is charged with the duty of deciding the kind of teachers who are to teach and it must be given considerable leeway in performing that duty.

Finally, in the better known case of *Scheelhaase v. Woodbury Central Community School District*,[18] the Eighth Circuit Court of Appeals specifically and squarely reversed the federal district court of Iowa's finding that a teacher's professional competence could not be determined solely on the basis of her student's standardized achievement test scores. The court's deference is obvious in its words:

> It is possible that the discretion of a Board may, at times, to those more generously endowed, seem to have been exercised with a lack of wisdom. But the Board's decisions in the exercise of its discretion are not vulnerable to our correction merely if they are "wrong", [sic] sustainable only if they are "right" . . . . It is our holding that the administration of the internal affairs of the school district before us has not passed by judicial fiat from the local board, where it was lodged by statute, to the Federal court. Such matters as the competence of teachers, and the standards of its measurement are not, without more, matters of constitutional dimensions. They are peculiarly appropriate to state and local administration.

The court's language as to constitutionality serves not only as an example of the deferential attitude to administrators' expertise but also as a caveat against a loose interpretation of the case's holding. The same issue posed by a tenured teacher in a state court under a specific teacher evaluation statute might well yield a different result.

CONCLUSIONS AND RECOMMENDATIONS

The number of cases on this subject is small, and the statutory context is varied, but a few conclusions may be drawn:

1. Present or proposed teacher evaluation policies and practices should be examined successively in light of constitutional considerations and federal civil rights laws, state statutes, applicable administrative regulations, and valid local collective bargaining agreements. While teacher evaluation is basically a state matter, the overlay of federally protected rights and the interplay with local collective bargaining cannot be ignored.
2. Courts tend to strictly apply the procedural requirements of teacher evaluation laws. Principals who fail to comply as evaluators may as a result fail in their own evaluations as well as be exposed to civil rights suits.

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[18] 488 F.2d 237 (1973).

3. Courts tend to defer to the discretion of school authorities with regard to the substantive aspects of teacher evaluation cases. However, the limits of professional discretion also cannot be ignored. The influence of facts upon judicial reviews is indisputable (e.g., tenured as contrasted to nontenured teachers), and the inservice education of judges under federal discrimination statutes (e.g., Title VII job-relatedness cases) can yield differences in response constituting distinctions in law.